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In The
Supreme Court of the United States

CITY OF VIRGINIA BEACH,

Petitioner,

v.

BRADLEY S. TANNER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a noise ordinance which proscribes "unreasonably loud, disturbing and unnecessary noise" – applying a reasonable person standard – impermissibly vague under the Due Process Clause of the United States Constitution?

LIST OF PARTIES TO THE PROCEEDING

Petitioner:

City of Virginia Beach

Respondents:

Bradley S. Tanner

Eric Alexander Williams

BAE Ventures, Inc. t/a The Peppermint Beach Club

RULE 29.6 STATEMENT

The City of Virginia Beach is not a publicly held corporation and does not have a parent or publicly held company owning 10% or more of the corporation's stock.

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PETITION FOR WRIT OF CERTIORARI

Mark D. Stiles, City Attorney for the City of Virginia Beach, on behalf of the City of Virginia Beach ("the City"), respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

OPINIONS BELOW

The Circuit Court of Virginia Beach, Virginia denied facial and "as-applied" challenges to the Virginia Beach Noise Ordinance by letter opinions dated August 13, 2007 and April 8, 2008, respectively. These opinions are reprinted at App. 26a,[1] and App. 17a. The Supreme Court of Virginia's Opinion reversing the circuit court is reported as Tanner v. The City of Virginia Beach, 277 Va. 432, 674 S.E.2d 848 (2009), and is reprinted at App. 1a. The Supreme Court of Virginia denied The City of Virginia Beach's Petition for Rehearing on June 12, 2009. (App. 30a).

INTRODUCTION

The Supreme Court of Virginia struck down as unconstitutional the entire Virginia Beach Noise Ordinance, City Code § 23-47 ("the Ordinance"). The Ordinance prohibits "unreasonably loud, disturbing and unnecessary noise in the city or any noise of such character, intensity and duration as to be

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[1] References to the Appendix contained in the Petition for Writ of Certiorari will be denoted "(App.__)."

detrimental to the life or health of persons of reasonable sensitivity or to disturb or annoy the quiet, comfort or repose of reasonable persons." (App. 70a). The Ordinance incorporates a "reasonable person" standard that law enforcement officers must apply before issuing a citation for violating the Ordinance. (App. 70a).

The Virginia Supreme Court found that the Ordinance is impermissibly vague under the Due Process Clause of the United States Constitution because it does not contain "ascertainable standards." (App. 9a). Rather, the court reasoned, "the determinations required by the ordinance can only be made by police officers on a subjective basis." (App. 11a). In so finding, the court concluded that the words "loud, disturbing and unnecessary," as used in this Ordinance, "are inherently vague because they require persons of average intelligence to guess at the meaning of those words." (App. 10a).

This Court has already held that the adjectives "loud" and "disturbing"—when read in context—pass constitutional muster in a vagueness challenge. Thus, the Virginia court's opinion conflicts with jurisprudence from this Court. And, the Virginia court's opinion is a marked departure from the existing case law from both federal and state courts that have reviewed similar noise ordinances. More importantly, though, this case raises the jurisprudentially significant question whether inclusion of the established and familiar "reasonable person" standard in a noise ordinance satisfies constitutional due process requirements, or whether noise ordinances must contain

mathematically precise standards such as decibel ranges or distance parameters in order to survive constitutional scrutiny.

These reasons compel this Court's review under Rule 10 of the Rules of the Supreme Court of the United States.

STATEMENT OF JURISDICTION

The Supreme Court of Virginia issued its decision on April 17, 2009, and denied Petitioner's request for Rehearing on June 12, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

> nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

2. The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

3. Virginia Beach City Code § 23-47 states:

> It shall be unlawful for any person to create, or allow to be created any unreasonably loud, disturbing and unnecessary noise in the city or any noise of such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity or to disturb or annoy the quiet, comfort or repose of reasonable

persons. The following acts, among others, are declared to be loud, disturbing and unnecessary noise in violation of this section, but such enumeration shall not be deemed to be exclusive:

(1) The playing of any television set, radio, tape player, phonograph or any musical instrument in such a manner or with such volume as to annoy or disturb the quiet, comfort or repose of reasonable persons.

(2) The keeping of any animal which, by causing frequent or long-continued noise, shall disturb the quiet, comfort or repose of the neighborhood to such an extent as to constitute a nuisance.

(3) The creation of any excessive noise on any street adjacent to any school, institution of learning or court, while the same is in session, or adjacent to any building used as a place of public worship, while being so used or adjacent to any hospital, which unreasonably interferes with the workings of such school, institution or court or the services being conducted in such place of public worship or which disturbs or unduly annoys patients in such hospital.

> (4) The shouting and crying of peddlers, hawkers and vendors which disturbs the peace and quiet of the neighborhood.
>
> (5) The use of any drum, loudspeaker or other instrument or device for the purpose of attracting attention, by creation of noise, to any performance, show or sale or display of merchandise.

STATEMENT OF THE CASE

A. Proceedings in the Circuit Court

On June 22, 2007, Bradley S. Tanner, Eric Alexander Williams, and BAE Ventures, Inc. t/a the Peppermint Beach Club (hereinafter, "Tanner," "Williams," or collectively "the Peppermint,") filed a Complaint in the Circuit Court of the City of Virginia Beach, Virginia seeking declaratory and injunctive relief against the enforcement of the Ordinance. (App. 59a).

The City filed a demurrer[2] contending that the Ordinance was facially valid. (App. 38a). In a letter opinion dated August 13, 2007, the circuit court sustained the demurrer in part, holding that the Ordinance was facially valid. The circuit court relied upon a prior circuit court opinion which had found

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[2] A demurrer tests the legal sufficiency of a pleading. Thompson v. Skate America, Inc., 261 Va. 121, 128, 540 S.E.2d 123, 126 (2001). Therefore, the circuit court did not consider evidence in ruling on the Peppermint's facial challenge.

that the Ordinance was "not facially vague or overbroad and does not, as written, violate any due process" rights under the Virginia Constitution. (App. 28a-29a). The circuit court dismissed the facial challenge, (App. 23a), and subsequently denied the Peppermint's motion to reconsider this ruling. (App. 14a, 19a).

Following a hearing on July 11, 2007, the circuit court denied the Peppermint's request for preliminary injunction, largely on grounds that the Peppermint could not "show a likelihood of success on the merits." (App. 28a).

By Order entered *nunc pro tunc* September 7, 2007, the circuit court overruled the City's demurrer as to the "as applied" challenge. (App. 23a-25a). A trial on the "as-applied" claim, as well as the selective enforcement claim, was held on February 26, 2008.

The Peppermint is a nightclub located in the 1800 block of Atlantic Avenue. (App. 1a, 47a). City police officers have repeatedly warned the Peppermint's owners, Tanner and Williams, that the music emanating from the interior of their establishment was unreasonably loud. (App. 2a, 48a). Failing to heed these warnings, on several occasions Tanner and Williams received Class 4 misdemeanor citations for unreasonably loud, disturbing and unnecessary noise, in violation of the Ordinance. (App. 2a-3a, 48a).

In a letter opinion dated April 8, 2008, the circuit court denied the Peppermint's "as-applied"

challenge. (App. 20a-22a). With regard to the facial challenge, the circuit court again noted that it had dismissed this claim on a demurrer, and held that it would not reverse its earlier ruling. (App. 19a).

Although the original Complaint purported to challenge the constitutionality of the Ordinance pursuant to the Constitution of Virginia, in its letter opinion issued on April 8, 2008, the trial court addressed the issue of constitutionality pursuant to the United States Constitution. Specifically, the trial court based its analysis upon the Equal Protection Clause contained in the United States Constitution and the case law regarding same. (App. 20a).

The circuit court entered a final order on April 21, 2008. (App. 13a).

B. Proceedings in the Supreme Court of Virginia

The Peppermint appealed to the Supreme Court of Virginia, arguing that (1) the circuit court erred in denying the facial challenge, (2) the ordinance is facially unconstitutional, (3) "as-applied" the ordinance is unconstitutional, and (4) the circuit court erred in denying relief given the specific finding of uneven enforcement. The Supreme Court of Virginia awarded the Peppermint a writ on October 30, 2008.

On April 17, 2009, the Supreme Court of Virginia issued an opinion reversing the circuit court. It found that the Ordinance as written

violated the Due Process Clause.[3] (App. 9a). Specifically, the court determined that the Ordinance fails to give "fair notice" -- as required by the Due Process Clause -- because the words "loud, disturbing and unnecessary" are inherently vague.[4] The Supreme Court of Virginia declined to address the per-se violations contained in the Ordinance, and did not reach the "as applied" selective enforcement claim.

The court refused the City's Petition for Rehearing. (App. 30a).

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[3] As the Supreme Court of Virginia was reviewing the facial validity claim on the trial court's resolution of the City's demurrer, it was limited to review of the Complaint. E.g., Thompson v. Skate America, Inc., 261 Va. 121, 124, 540 S.E.2d 123, 124 (2001) ("Our review is governed by the well-settled principle that when we consider the trial court's sustaining of a demurrer 'we look solely at [the plaintiff's] allegations in his motion for judgment to determine whether he stated a cause of action.'") (quoting Perk v. Vector Resources Group, Ltd., 253 Va. 310, 312, 485 S.E.2d 140, 142 (1997)).

[4] Although the court did not expressly articulate whether its holding was based upon federal or state principles, the court relied primarily upon jurisprudence from this Court interpreting the United States Constitution.

REASONS FOR GRANTING CERTIORARI

I. The Virginia Supreme Court's Opinion Conflicts with this Court's Due Process Jurisprudence and Misinterprets and Misapplies the Law Regarding the Reasonable Person Standard.

The Supreme Court of Virginia's ruling that the Ordinance is vague under the Due Process Clause and thus unconstitutional, conflicts with this Court's prior holdings that the words "loud" and "disturbing" in a criminal statute—when read in a limited context—withstand a vagueness challenge under the Due Process Clause. The Virginia Court's opinion also conflicts with this Court's established reliance on the "reasonable person standard" in criminal cases. Finally, its opinion departs from the jurisprudence from federal courts and other state supreme courts addressing the issue whether the "reasonable person" standard saves an otherwise unconstitutional noise or similar ordinance.

A. This Court has held that the reasonable person standard in a criminal law provides sufficient standards to satisfy the Due Process Clause.

The Supreme Court of Virginia erred in finding that the Ordinance did "not contain ascertainable standards." (App. 9a). The Virginia court found the "reasonable person" standard contained in the Ordinance to be constitutionally

deficient, requiring instead a standard that sets forth "what noise levels are prohibited." (App. 11a). Because the City's Ordinance contains an objective, ascertainable standard by which a noise violation is measured – the "reasonable person" standard – it satisfies the Due Process Clause.

The Due Process Clause is not as demanding as the Supreme Court of Virginia found. Contrary to the Virginia court's holding, the Due Process Clause does not require municipalities to adopt bright-line rules or mathematical formulas in penal laws. See Grayned v. City of Rockford, 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language.") Rather, an ordinance may allow for flexibility and reasonable breadth, and need not be drafted with meticulous specificity so long as it is clear what the ordinance as a whole prohibits. See generally Grayned, 408 U.S. 104; Kovacs v. Cooper, 336 U.S. 77, 79 (1949); Cameron v. Johnson, 390 U.S. 611, 616 (1968).

The Due Process Clause does not require a noise ordinance to define impermissible noise levels in decibel ranges or other mathematical parameters. Grayned, 408 U.S. at 112 (upholding a noise ordinance even though "the prohibited quantum of disturbance is not specified" and it lacked mathematical precision). Here, prohibited disturbances are easily measured by their impact on the familiar "reasonable man." Id. Thus, the Virginia court's insistence on legislatively drafted noise levels impermissibly rewrites this Court's Due Process law.

Equally important, the Virginia Supreme Court's rejection of the "reasonable person" standard as a reasonably certain and definite standard for determining proscribed conduct under the Due Process Clause stands in stark contrast to this Court's jurisprudence. In Cameron, the petitioner argued that the addition of "unreasonably" to a criminal picketing statute made the statute impermissibly vague. 390 U.S. at 616. However, this Court held that the word "unreasonably" "is a widely used and well understood word and clearly so when juxtaposed with obstruct and interfere. . . [T]he statute clearly and precisely delineates its reach in words of common understanding." Id.

Similarly, this Court has held that so long as an ordinance's construction contains an "ascertainable standard" such as "the sensitivity of a hypothetical reasonable man," the ordinance is not unconstitutionally vague. See Coates v. City of Cincinnati, 402 U.S. 611, 613-614 (1971) (emphasis added). Where this Court ascribes sufficient clarity to the "reasonable person" standard to survive a vagueness challenge under the Due Process Clause —even when used to define specific criminal conduct—an opinion from the Virginia Supreme Court cannot have the opposite result.

B. The "reasonable person" standard permeates this Court's jurisprudence.

The reasonable person standard permeates this Court's jurisprudence. In the context of federal prosecution for mailing obscene materials, this Court

held that two prongs of a three prong test to determine whether the material is obscene are issues of fact for the jury to determine applying contemporary community standards. See Smith v. United States, 431 U.S. 291, 301 (1977) (discussing the first and second prongs, appeal to prurient interest and patent offensiveness). This Court then carefully crafted the third prong, stating "[t]he First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent." Id. Thus, for the third prong the relevant question is "whether a reasonable person would find ... value in the material, taken as a whole." Ashcroft v. ACLU, 535 U.S 564, 579 (2002) (emphasis added).

In the context of Section 1983 claims against government employees, this Court has held that the defense of "qualified immunity" requires courts to enter judgment in favor of a government employee unless the employee's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

In addressing the interplay between prison regulations and the First Amendment, this Court "adopted a standard of review that focuses on the reasonableness of prison regulations: the relevant inquiry is whether the actions of prison officials were reasonably related to legitimate penological interests." Turner v. Safely, 482 U.S. 78, 89 (1987)

(emphasis added). In other words, in order to survive a constitutional challenge, a prison regulation that burdens fundamental rights must be "reasonably related" to legitimate penological objectives. Id. This Court reasoned that "such a standard is necessary if prison administrators ..., and not the courts, [are] to make the difficult judgments concerning institutional operations." Thornburgh v. Abbott, 490 U.S. 401, 409 (1989) (internal citations omitted). This Court also noted that this standard is not "toothless." Id. at 414.

And in the context of Fourth Amendment seizures, the law is well settled that "law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen." U.S. v. Drayton, 536 U.S. 194, 200-201, 122 (2002) (citing Florida v. Royer, 460 U.S. 491, 497 (1983)). Instead, if a reasonable person would feel free to terminate the encounter, then he or she has not been seized. Id. (emphasis added).

In a myriad of criminal law settings, this Court recognizes that the "reasonable person" standard is ascertainable and readily evident to the common man.

C. This Court has held that the words "loud" and "disturbing" are not vague in the context of other noise ordinances.

The Supreme Court of Virginia found the words "loud, disturbing and unnecessary" to be unconstitutionally vague. (App. 10a). This holding departs from settled, controlling law.

In Kovacs, this Court addressed whether the terms "raucous" and "loud" were so vague as to be unenforceable. 336 U.S. at 79. In rejecting the vagueness claim, Justice Reed opined:

> The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. The objection centers around the use of words "loud and raucous." While these are abstract words, they have through daily use acquired a content that conveys to an interested person a sufficiently accurate concept of what is forbidden.

Id. Thus, the words "loud" and "raucous" were not unconstitutionally vague.

Like the ordinance in Kovacs, the City's Ordinance prohibits "loud" noises, but only those that are unreasonably loud. The Ordinance is therefore narrower than the one upheld in Kovacs.

and gives fair notice of the proscribed conduct as required by the Due Process Clause.

Although the Virginia Supreme Court found that the words "unreasonably loud and disturbing" are vague and allow for subjective police enforcement, this Court has concluded that the use of the word "loud" and other "abstract words" which "have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden," is sufficient to save a statute from a vagueness challenge under the Due Process Clause. Kovacs, 336 U.S. at 79.

Similarly, in Grayned, this Court held that an ordinance prohibiting noise that "disturbs or tends to disturb" was not impermissibly vague under the Constitution. 408 U.S. at 109. This Court rejected a vagueness challenge under the Due Process Clause, writing that

> [c]ondemned to the use of words, we can never expect mathematical certainty from our language. The words of the Rockford ordinance are marked by flexibility and reasonable breadth, rather than meticulous specificity, but we think it is clear what the ordinance as a whole prohibits.

Id. at 108.

The Grayned Court noted that "although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's

announced purpose that the measure is whether normal school activity has been or is about to be disrupted." Id. at 112. The "particular context"—i.e., the statute when read in its entirety—gives "fair notice to those to whom (the ordinance) is directed." Id.

Like the statute in Grayned, the Ordinance prohibits noise which disturbs, but limits what constitutes a criminal offense to only "unreasonably loud, disturbing and unnecessary noise" and noise of such character as "to disturb or annoy the quiet, comfort, or repose of reasonable persons." Additionally, the reasonable person standard, and the *per se* violations contained in the body of the Ordinance, provide the context for the words "unreasonably loud, disturbing and unnecessary" to sufficiently warn what conduct it prohibits.

Finally, unlike the ordinance upheld in Kovacs, the City's Ordinance places an additional restriction on what constitutes a criminal noise violation—i.e., that the noise must be loud, disturbing, and unnecessary to a reasonable person. As discussed, this Court has identified the "reasonable person" standard as providing an ascertainable standard, enabling a person of common intelligence to identify what conduct the statute prohibits. See generally Coates, 402 U.S. at 614. Taken together, where the reasonable person standard as well as the specific words "loud" and "disturbing" have all been found by this Court to be sufficiently definite to defeat a vagueness challenge under the Due Process Clause, the Virginia Supreme

Court's opinion unquestionably conflicts with jurisprudence from this Court.

II. Federal Courts of Appeal and State Supreme Courts Have Upheld Noise Ordinances Similar to the One Struck Down by the Supreme Court of Virginia.

Several noise ordinances similar to the City's Ordinance have survived constitutional scrutiny. While many courts have acknowledged that the challenged ordinances contain abstract or imprecise adjectives, those courts have also held that, when read in the context of a statute containing the reasonable person standard, those ordinances nonetheless survive a vagueness challenge. Thus, although none of these cases is binding on this Court, they underscore the dangerous conflict created by the Supreme Court of Virginia's decision, as the following summary demonstrates.

A. Federal Cases

Howard Opera House Associates v. Urban Outfitters, Inc., 322 F.3d 125, 128 (2d Cir. 2003)

> ("The argument that the Burlington noise ordinance is unconstitutionally vague is effectively precluded by our decision in Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir.1994), where we held that an injunction prohibiting 'excessively loud sound' that 'injures, disturbs, or endangers the health or safety' of

> others is sufficiently clear to withstand a vagueness challenge. Here, we have an ordinance that prohibits 'loud or unreasonable noise,' with 'unreasonable' noise defined as that which 'disturbs, injures or endangers the peace or health of another or ... endangers the health, safety or welfare of the community. . . .' [W]e find that the differences between the Schenck injunction and the Burlington noise ordinance are minor at best, and hold that the portion of the Burlington noise ordinance here applied passes constitutional muster.") (internal citations omitted);

Reeves v. McConn, 631 F.2d 377, 386 (5th Cir. 1980)

> ("The Supreme Court has approved the use of the word 'unreasonably' in similar statutes that are otherwise precise and narrowly drawn. The Court has also approved the terms 'loud' and 'raucous' as standards of prohibited sound amplification. Though these words are abstract, 'they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden.' We approve the words 'jarring' and 'nuisance' on the same grounds, even though they fall short of providing "mathematical certainty.' 'Flexibility

and reasonable breadth, rather than meticulous specificity,' is acceptable in this area.") (internal citations omitted);

B. State Cases

City of Beaufort v. Baker, 432 S.E.2d 470, 474 (S.C. 1993)

> ("In similar fashion, we here apply normal meanings to words of common understanding and conclude that speech that is so unreasonably loud as to unreasonably intrude on the privacy of a captive audience may be punished. We hold that the words 'loud and unseemly,' so construed, give sufficient notice of what conduct is penalized. 'Unseemly' modifies 'loud' and means 'unreasonably loud in the circumstances.' That is clear enough. The objective 'reasonable' test is used in many areas of the law as an appropriate determinant of liability and thus a guide to conduct.")(internal citations omitted);

City of Madison v. Baumann, 470 N.W.2d 296, 302 (Wis. 1991)

> ("[T]he word, reasonably, saves the ordinance from the infirmity of vagueness. The reasonable-person standard is one that has been relied upon in all branches of the law for

> generations. . . . The reasonable person is a reasonable person in the circumstances. . . . In the instant case, the circumstances are adequately spelled out. They are simply what a reasonable person would conclude would disturb the peace and quiet of the vicinity. The test for a possible violator is simply the time honored and time validated reasonable person test, *i.e.*, what effect will my conduct [] have upon persons in the vicinity under the circumstances.");

Eanes v. State, 569 A.2d 604, 616 (Md. 1990)

> ("In similar fashion, we here apply normal meanings to words of common understanding and conclude that speech that is so unreasonably loud as to unreasonably intrude on the privacy of a captive audience may be punished. We hold that the words loud and unseemly, so construed, give sufficient notice of what conduct is penalized. Unseemly modifies loud and means unreasonably loud in the circumstances. That is clear enough. The objective reasonable test is used in many areas of the law as an appropriate determinant of liability and thus a guide to conduct.");

Earley v. State, 789 P.2d 374, 376 (Alaska App. 1990)

("A statute is not vague merely because a fact finder must determine questions of reasonableness. Having examined AS 11.61.110(a) and (b), we are satisfied that the statute gives reasonable notice of the conduct it prohibits and that the phrase unreasonably loud noise as defined is not unconstitutionally vague.");

Harlem Yacht Club v. New York City Environmental Control Bd., 40 A.D.3d 331, 332, (N.Y. 2007)

> ("Nor is the ordinance, which bans 'unreasonable noise,' defined as 'any excessive or unusually loud sound that disturbs the peace, comfort or repose of a reasonable person of normal sensitivities, injures or endangers the health or safety of a reasonable person of normal sensitivities or which causes injury to plant or animal life, or damage to property or business' (Administrative Code § 24-203[62]), impermissibly vague.");

Lutz v. City Of Indianapolis, 820 N.E.2d 766, 769 (Ind. App. 2005)

> ("The myriad of noises that the Ordinance in the instant case prohibits is exactly the reason that it is unconstitutionally vague. Indiana's disorderly conduct statute is narrowly tailored to prohibit 'unreasonable' noise made only after an individual has been warned about his conduct. The

> Ordinance in the instant case, however, does not include an objective test; instead, Lutz correctly notes that it prohibits *any* noise that is 'loud,' 'unnecessary,' or 'unusual,' or that annoys or disturbs others.");

People v. Lord, 796 N.Y.S.2d 511, 511 - 512 (N.Y. 2005)

> ("It is well settled that an ordinance may penalize 'unreasonable' noise under circumstances as defined in the ordinance at issue and that 'unreasonableness' is an objective standard of evaluation. There is no constitutional requirement that a decibel meter or other such device be used to determine whether a noise level will be considered illegal. By employing a reasonableness standard, which can be interpreted on the basis of common life experience, the ordinance provides greater comprehensible notice of prohibited behavior and better implements the legislative intent behind such an ordinance.") (internal quotations and citations omitted);

State v. Dorso, 446 N.E.2d 449, 452 (Ohio 1983)

> ("[W]e construe the Cincinnati ordinance at issue to prohibit the playing of music, amplification of sound, etc., in a manner which could be

> anticipated to offend the reasonable person, *i.e.*, the individual of common sensibilities. Specifically, we find the ordinance to proscribe the transmission of sounds which disrupt the reasonable conduct of basic human activities, *e.g.*, conversation or sleep. Our construction of the ordinance does not permit the imposition of criminal liability upon a party whose conduct disturbs only the hypersensitive. Thus, the standard hereby adopted vitiates the claimed vagueness of the ordinance.");

State v. Friedman, 697 A.2d 947, 950 (N.J. 1997)

> ("Neither the Law Division Judge nor the Municipal Court Judge considered the reasonableness of the Friedmans' conduct in determining whether their dog's barking violated the anti-noise ordinance. A purely subjective standard of behavior was utilized to determine whether the dog's barking constituted a disturbance of the peace; such a standard is unconstitutionally vague.");

State v. Holcombe, 187 S.W.3d 496, 499 –500 (Tex. Crim. App. 2006)

> ("We agree with the State that the Bedford noise ordinance contains objective criteria for determining what conduct is prohibited and therefore does

> not permit arbitrary enforcement. The ordinance clearly establishes an objective reasonable-person standard by referring to neighboring persons of ordinary sensibilities and banning noise that unreasonably disturb[s] or interfere[s] with the peace, comfort and repose of such persons. These words describe noise of the type or volume that a reasonable person would not tolerate under the circumstances.") (internal quotations omitted);

State v. Johnson, 542 P.2d 808, 810 (Ariz. 1975)

> ("In order to determine whether the noise made by appellant was loud and unusual, it must be evaluated in terms of a reasonable man standard. Our inquiry must determine whether the noise would disturb a person of ordinary sensitivities; that is, the language or conduct is to be adjudged to be disorderly, not merely because it offends some supersensitive or hypercritical individual, but because it is, by its nature, of a sort that is a substantial interference with (our old friend) the reasonable man.") (internal quotations omitted);

Town of Baldwin v. Carter, 794 A.2d 62, 68 (Me. 2002)

> ("We interpret the Town's ordinance in this case to mean that continuous or repeated dog barking that is unnecessary is actionable only if it is unreasonable. . . . Reasonableness is a well defined concept under the common law. Reasonable compliance is not an unconstitutionally vague concept. If it were, most tort law doctrines and a host of other legal standards would be invalid-the reasonable person, beyond reasonable doubt, reasonable good faith efforts, etc.") (internal citations and quotations omitted);

Township of Plymouth v. Hancock, 600 N.W.2d 380, 382-83 (Mich. 1999)

> ("The people argue the use of the reasonable person standard in the ordinance saves the ordinance from being impermissibly vague. We agree. The ordinance plainly states that the type of conduct that is prohibited is that which tends 'to *unreasonably* annoy or disturb the quiet, comfort and repose of persons in the vicinity.' (Emphasis added.) . . . .We believe the reasonable person standard serves to provide fair notice of the type of conduct prohibited, as well as preventing abuses in application of the ordinance. The reasonable person standard assures that 'the person of ordinary intelligence [has] a reasonable opportunity to know

> what is prohibited, so that he may act accordingly.'") (internal citations omitted).

Given the conflict created by the decision of the Supreme Court of Virginia regarding the constitutionality of noise ordinances under the Due Process Clause, and in particular, those which contain a limiting and objective reasonable person standard, this Court's guidance is necessary to clarify this important issue. Specifically, the City respectfully submits that this Court should find that a noise ordinance prohibiting any "unreasonably loud, disturbing and unnecessary noise" – as measured under the familiar "reasonable person standard" – does not violate the Due Process Clause of the United States Constitution.

III. The Decision Below is Grounded on Authority Which does not Support the Conclusion the Supreme Court of Virginia Reached.

In holding that the Ordinance's use of the "reasonable person" standard does not save it from a vagueness challenge under the Due Process Clause, the Virginia Supreme Court relies on Thelen v. State, 526 S.E.2d 60, 62 (Ga. 2000). In Thelen, the Georgia Supreme Court held that a noise ordinance prohibiting "any ... unnecessary or unusual sound or noise which ... annoys ... others in the county" failed to provide the requisite clear notice of the prohibited conduct. Id. Specifically, the court held that "[t]he adjectives unnecessary and unusual modifying the noun noises are inherently vague and elastic and

require men of common intelligence to guess at their meaning. The same may be said of the verb annoys." Id. (internal citations and quotations omitted). Thus, the court found the ordinance to be unconstitutional.

The noise ordinance in Thelen did not have a "reasonable person" standard by which the prohibited conduct could be measured. Rather, the ordinance resorted to "others in the county" to determine what noise was prohibited. The Thelen court found the ordinance unconstitutional because, in order to comply with or enforce the ordinance, an individual would be required to apply a "completely subjective standard." Id.

As further proof that the absence of an objective "reasonable person" standard doomed the Georgia ordinance, the Thelen court compares its holding with that set forth in State v. Garren, 451 S.E.2d 315, 318-319 (N.C. 1994). In Garren, the Court of Appeals of North Carolina upheld a portion of the noise ordinance at issue because the ordinance included the "objective" standard of "reasonable persons of ordinary sensibilities." Id. In other words, implicit in Thelen's holding is that a "reasonable person standard" could have saved the ordinance from being declared vague and thus unconstitutional. Because the noise ordinance in Thelen lacked the objective, reasonable person standard found in the City's Ordinance, the Supreme Court of Virginia's reliance on Thelen is misplaced.

Similarly, the Supreme Court of Virginia holding is not supported by Nichols v. City of

Gulfport, 589 So.2d 1280 (1991), because the Gulfport ordinance did not employ a "reasonable person" standard. In Nichols, the Supreme Court of Mississippi held that an ordinance which prohibited "unnecessary or unusual noises ... which either annoys, injures or endangers the comfort, repose, health or safety of others ..." was unconstitutionally vague. Because the ordinance in Nichols makes no reference to a reasonable person standard, the Supreme Court of Virginia's reliance on Nichols is misplaced.

Nor does the decision in People v. New York Trap Rock Corp., 442 N.Y.2d 1222, 1224 (N.Y. 1982), support the Virginia court's decision that a "reasonable person" standard is impermissibly vague in a noise ordinance. In that case, the Court of Appeals of New York held that a noise ordinance stating, "[n]o person shall make . . . any unnecessary noise" including, among other things, "any excessive or unusually loud sound or any sound which either annoys, disturbs, injures or endangers the comfort, repose, health, peace or safety of a person." As in Thelen and Nichols, the ordinance in New York Trap Rock did not contain a reasonable person standard, nor did the court address the question whether such a standard would cure the vagueness of the statute.

The Supreme Court of Virginia also relied heavily on this Court's decision in Grayned, although the Grayned Court actually found that the Rockford noise ordinance was not impermissibly vague, and survived constitutional scrutiny. It is particularly difficult to reconcile the Virginia court's opinion with

Grayned, which found the following noise ordinance sufficiently definite to satisfy the requirements of the Due Process Clause: "any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class." In short, Grayned, like the other cases on which the Virginia court justified its conclusion, neither compels nor particularly supports the result. To the contrary, under this Court's Due Process jurisprudence, the City's Ordinance is constitutional.

CONCLUSION

This Petition for Writ of Certiorari presents an important question of federal constitutional law. This Court should grant certiorari to address and clarify the constitutional vagueness standards applicable to noise ordinances which explicitly include a "reasonable person" standard. And, this Court should grant certiorari to reverse the Supreme Court of Virginia's erroneous interpretation and application of both this Court's jurisprudence and the Due Process Clause.

Respectfully submitted,

/s/ Christopher S. Boynton
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Counsel for the Petitioner

September 10, 2009

APPENDIX

[ENTERED APRIL 17, 2009]

PRESENT: All the Justices

BRADLEY S. TANNER, ET AL.

v. Record No. 080998

CITY OF VIRGINIA BEACH

OPINION BY
JUSTICE BARBARA MILANO KEENAN
April 17, 2009

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
A. Joseph Canada, Jr., Judge

In this appeal, we consider whether the circuit court erred in rejecting a constitutional challenge to a municipal noise control ordinance.

Bradley S. Tanner and Eric A. Williams (collectively, the owners) own and operate BAE Ventures, Inc., t/a The Peppermint Beach Club (the club), a licensed restaurant and entertainment venue located in the 1800 block of Atlantic Avenue in the City of Virginia Beach (City). The club is located in a part of the City commonly referred to as the "oceanfront," which includes restaurants, bars, hotels, and outdoor entertainment venues.

The club, which is on the ground floor of the Howard Johnson Hotel, hosts disc jockeys and occasional "live" entertainment groups that play

various types of music including "hip-hop," "punk rock," "emo," and "indie" music. The owners repeatedly have been warned by City police officers about music sound levels, and have received citations for violations of Virginia Beach City Code § 23-47 (the ordinance). The ordinance states:

> It shall be unlawful for any person to create, or allow to be created any unreasonably loud, disturbing and unnecessary noise in the city or any noise of such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity or to disturb or annoy the quiet, comfort or repose of reasonable persons. The following acts, among others, are declared to be loud, disturbing and unnecessary noise in violation of this section, but such enumeration shall not be deemed to be exclusive:
>
> (1) The playing of any television set, radio, tape player, phonograph or any musical instrument in such a manner or with such volume as to annoy or disturb the quiet, comfort or repose of reasonable persons.
>
> (2) The keeping of any animal which, by causing frequent or long-continued noise, shall disturb the quiet, comfort or repose of the neighborhood to such an extent as to constitute a nuisance.

> (3) The creation of any excessive noise on any street adjacent to any school, institution of learning or court, while the same is in session, or adjacent to any building used as a place of public worship, while being so used or adjacent to any hospital, which unreasonably interferes with the workings of such school, institution or court or the services being conducted in such place of public worship or which disturbs or unduly annoys patients in such hospital.
>
> (4) The shouting and crying of peddlers, hawkers and vendors which disturbs the peace and quiet of the neighborhood.
>
> (5) The use of any drum, loudspeaker or other instrument or device for the purpose of attracting attention, by creation of noise, to any performance, show or sale or display of merchandise.

Virginia Beach City Code § 23-47. Any violation of the ordinance constitutes a class 4 misdemeanor. Id.

In June 2007, the owners filed a complaint seeking a declaratory judgment that the ordinance is unconstitutional on its face because it is vague, and that it is unconstitutional as applied to the club. The owners alleged that the ordinance is vague because it fails to provide citizens with "fair notice" regarding what conduct is unlawful, and because the ordinance language invites selective prosecution by granting

law enforcement officials the "unfettered individual discretion" to make enforcement decisions. The owners separately alleged that City police officers have applied and enforced the ordinance against the owners "in a subjective and selective manner."

In response to the owners' complaint, the City filed a demurrer, which the circuit court sustained in part based on its previous determination that the ordinance was constitutional on its face. Relying on that prior decision, the circuit court held, among other things, that the ordinance is not vague, and dismissed the owners' facial constitutional challenge with prejudice.

The case proceeded to trial on the issue of the City's application of the ordinance to the sound levels generated by the club's music. Certain City police officers testified that the City used two enforcement standards in evaluating noise emanating from oceanfront business establishments. The first standard used was the "reasonable person" standard provided for by the ordinance. The second standard employed was an "across the street" assessment established by Police Captain Anthony F. Zucaro.

Addressing the "reasonable person" standard, Captain Zucaro testified that police officers determine whether noise is "unreasonably loud, disturbing and unnecessary" by employing the officers' "[b]ackground, experience, knowledge of the dynamics of the moment, listening, [and] witnessing." Officers Albert L. Mills, Christopher D. D'Orio, and Steven J. Kennedy testified that officers

usually exercise their discretion whether to issue a citation for violation of the ordinance. These officers generally conceded that "reasonableness" is a standard that depends on an individual officer's assessment and on environmental factors such as the weather, the volume of ambient noise, and the time of day.

In 2007, Zucaro issued a letter that was distributed to oceanfront business owners in an effort to achieve voluntary compliance with the ordinance. The letter informed the business owners that police officers would take enforcement action if "[t]he intensity of the noise emanating from an establishment is at such a level it can be definitively linked to that particular establishment from across the street or a distance equal to that measurement despite the presence of other ambient noise levels."

Several police officers testified regarding incidents in which noise emanating from the club resulted in the issuance of citations to the owners. Relying on this and other evidence, the circuit court determined that the evidence "unequivocally establishe[d] that the enforcement of the noise ordinance is selective and uneven." However, the circuit court held that because the owners failed to prove that this selective enforcement was motivated by a discriminatory purpose, the club's constitutional challenge to the City's application of the ordinance failed. The owners appealed from the circuit court's judgment.

On appeal, the owners first argue that the circuit court erred in rejecting their facial

constitutional challenge to the ordinance. They contend that the ordinance is vague and, thus, is unconstitutional on its face because business owners must engage in guesswork to determine whether certain sound levels violate the ordinance. The owners further assert that several terms in the ordinance, including the terms "unnecessary," "loud," "disturbing," "character," and "intensity," are purely subjective and do not establish clear standards that permit uniform enforcement.

In response, the City argues that the ordinance clearly articulates an objective, "reasonable person" standard that is well established and is sufficiently definite to permit persons to conform their conduct to the law. The City concedes that the terms of the ordinance are not quantitatively precise, but argues that such a level of precision is not required to survive a vagueness challenge. The City contends that only a flexible standard such as the one prescribed by the ordinance can fairly define criminal conduct related to the "wide swath of settings and circumstances" involved when assessing noise levels.

The City further argues that the term "unnecessary" does not render the ordinance vague because the ordinance requires that noise be unreasonably loud, disturbing, and unnecessary before a criminal citation can issue. The City contends that instead of rendering the ordinance vague, the term "unnecessary" narrows the category of noise that constitutes a criminal violation and provides added protection to potential offenders. However, the City further maintains that if this

Court disagrees, it should sever any offending language rather than invalidate the entire ordinance. We disagree with the City's arguments.

Our review of the ordinance begins with the principle that that duly enacted laws are presumed to be constitutional. Marshall v. Northern Virginia Transp. Auth., 275 Va. 419, 427, 264 Va. 656, 665, 571 S.E.2d 122, 126 (2002); 657 S.E.2d 71, 75 (2008); In re Phillips, 265 Va. 81, 85, 574 S.E.2d 270, 272 (2003); Yamaha Motor Corp., U.S.A. v. QuillianFinn v. Virginia Retirement System, 259 Va. 144, 153, 524 S.E.2d 125, 130 (2000). We are required to resolve any reasonable doubt concerning the constitutionality of a law in favor of its validity. In re Phillips, 256 Va. at 85-86, 574 S.E.2d at 272; Finn, 259 Va. at 153, 524 S.E.2d at 130; Walton v. Commonwealth, 255 Va. 422, 427, 497 S.E.2d 869, 872 (1998). Thus, if a statute or ordinance can be construed reasonably in a manner that will render its terms definite and sufficient, such an interpretation is required. See INS v. St. Cyr, 533 U.S. 289, 299-300 (2001); United States v. Harriss, 347 U.S. 612, 618 (1954); Pedersen v. City of Richmond, 219 Va. 1061, 1065, 254 S.E.2d 95, 98 (1979).

In this context, we consider the constitutional principles applicable to a vagueness challenge involving a penal statute or ordinance. The constitutional prohibition against vagueness derives from the requirement of fair notice embodied in the Due Process Clause. See United States v. Williams, 553 U.S. ___, ___, 128 S.Ct. 1830, 1845 (2008); City of Chicago v. Morales, 527 U.S. 41, 56 (1999);

Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). The doctrine requires that a statute or ordinance be sufficiently precise and definite to give fair warning to an actor that contemplated conduct is criminal. See Kolender v. Lawson, 461 U.S. 352, 357 (1983); Grayned, 408 U.S. at 108. Thus, the language of a law is unconstitutionally vague if persons of "common intelligence must necessarily guess at [the] meaning [of the language] and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926); accord Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971); Cameron v. Johnson, 390 U.S. 611, 616 (1968).

The constitutional prohibition against vagueness also protects citizens from the arbitrary and discriminatory enforcement of laws. A vague law invites such disparate treatment by impermissibly delegating policy considerations "to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned, 408 U.S. at 108-09; see Kolender, 461 U.S. at 357-61.

Because legislative bodies are "[c]ondemned to the use of words," courts cannot require "mathematical certainty" in the drafting of legislation. Grayned, 408 U.S. at 110. For this reason, an ordinance that lacks meticulous specificity nevertheless may survive a vagueness challenge if the ordinance as a whole makes clear what is prohibited. See id.; Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (8th Cir. 1969).

A different concern arises, however, when a vague statute implicates citizens' rights under the First Amendment. In such circumstances, vague language in a statute or ordinance may cause citizens to avoid constitutionally permissible conduct based on a fear that they may be violating an unclear law. Thus, a vague statute may inhibit the exercise of constitutionally protected activities. Grayned, 408 U.S. at 108-09.

In applying these principles, we first acknowledge that the regulation of noise by a locality creates special problems regarding the drafting and enforcement of legislation. See Nichols v. City of Gulfport, 589 So. 2d 1280, 1283 (Miss. 1991); People v. New York Trap Rock Corp., 442 N.E.2d 1222, 1226 (N.Y. 1982). These problems arise from the nature of sound, which invites the use of broadly stated definitions and prohibitions. Nichols, 589 So. 2d at 1283; Trap Rock, 442 N.E.2d at 1226.

The ordinance before us prohibits any "unreasonably loud, disturbing and unnecessary noise," noise of "such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity," or noise that "disturb[s] or annoy[s] the quiet, comfort or repose of reasonable persons." The ordinance also describes various acts that constitute per se violations.

We conclude that these provisions fail to give "fair notice" to citizens as required by the Due Process Clause, because the provisions do not contain ascertainable standards. See Thelen v. State, 526 S.E.2d 60, 62 (Ga. 2000); Nichols, 589 So. 2d at

1284. Instead, the reach of these general descriptive terms depends in each case on the subjective tolerances, perceptions, and sensibilities of the listener.

Noise that one person may consider "loud, disturbing and unnecessary" may not disturb the sensibilities of another listener. As employed in this context, such adjectives are inherently vague because they require persons of average intelligence to guess at the meaning of those words. See Thelen, 526 S.E.2d at 62; Lutz v. City of Indianapolis, 820 N.E.2d 766, 769 (Ind. Ct. App. 2005); Nichols, 589 So. 2d at 1283.

The references in the ordinance to "reasonable persons," and to persons of "reasonable sensitivity," do not provide a degree of definiteness sufficient to save the ordinance from the present vagueness challenge. Such terms, considered in their context, delegate to a police officer the subjective determination whether persons whom the police officer considers to be of reasonable sensitivity would find the noise detrimental to their life or health. Likewise, these terms leave to a police officer the determination whether persons the police officer considers to be reasonable would be disturbed or annoyed in their comfort or repose by the particular noise at issue.

Determinations of this nature invite arbitrary enforcement. Police officers likely will have differing perceptions regarding what levels of sound exceed the described tolerance levels and sensitivities of reasonable persons. Because these determinations

required by the ordinance can only be made by police officers on a subjective basis, we hold that the language of the ordinance is impermissibly vague. See Grayned, 408 U.S. at 108-09; U.S. Labor Party v. Pomerleau, 557 F.2d 410, 412 (4th Cir. 1977); Thelen, 526 S.E.2d at 62. The imposition of criminal penalties for the violation of an ordinance cannot rest on the use of subjective standards, nor may an ordinance consign a person to penal consequences without first providing sufficiently definite notice of prohibited activities. See Thelen, 526 S.E.2d at 62; Nichols, 589 So. 2d at 1284.

We find no merit in the City's argument that its use of the term "reasonable persons" nevertheless rescues the ordinance from the present vagueness challenge because the criminal law employs a "reasonable person" standard in various other types of determinations. Such comparisons are inapposite. Here, the City attempts to satisfy the notice requirement of the Due Process Clause by using a standard that does not notify or warn citizens in clear and definite terms what noise levels are prohibited. In contrast, the use of a "reasonable person" standard elsewhere in the criminal law does not attempt to provide notice to citizens regarding the reach of a criminal statute or ordinance, but sets a standard for a court to use in determining police compliance with certain constitutional and other legal requirements. See, e.g., Brendlin v. California, 551 U.S. 249, ___, 127 S.Ct. 2400, 2405-06 (2007) ("seizure" within meaning of Fourth Amendment occurs when reasonable person would not feel free to leave); Buhrman v. Commonwealth, 275 Va. 501, 505, 659 S.E.2d 325, 327 (2008) (probable cause

exists when facts and circumstances of which police officer has "reasonably trustworthy information . . . warrant a person of reasonable caution to believe that an offense has been or is being committed") (quoting Taylor v. Commonwealth, 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981)).

In concluding that the ordinance is vague, we do not directly address the list of per se violations contained in the ordinance. Each of these per se violations is defined as constituting "loud, disturbing and unnecessary noise" and, thus, cannot be evaluated separately from those vague terms.

Finally, we hold that we are unable to sever from the ordinance the unconstitutional language that we have identified and give its remaining language a definite and permissible construction. Instead, the vague language adjudged unconstitutional in this opinion affects the content of the entire ordinance.*

For these reasons, we will reverse the circuit court's judgment and will enter final judgment for the owners declaring that the entire ordinance is unconstitutional because it is vague.

Reversed and final judgment.

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* In view of our holding that the ordinance is vague, we do not reach the owners' remaining contentions alleging that the ordinance is overbroad and has been enforced selectively by City police.

[ENTERED APRIL 21, 2008]

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

BRADLEY S. TANNER
ERIC ALEXANDER WILLIAMS
and BAE VENTURES, INC. t/a
THE PEPPERMINT BEACH CLUB,

Plaintiffs,

v. Case No. CL07-3754

THE CITY OF VIRGINIA BEACH,

Defendant.

FINAL ORDER

THIS MATTER came to be heard on the 16th day of February, 2008, upon the First Amended Complaint filed by the plaintiffs, and evidence and argument were received and considered by the court, in addition to evidence, testimony and materials previously received by the court and already in the record; thereafter, the parties filed additional materials with the court, and, thereafter, the court issued a letter opinion dated April 8, 2008;

WHEREAS, after consideration of the evidence, exhibits, arguments and materials submitted to the court; and

WHEREAS, for the reasons stated in this court's April 8, 2008 opinion, which is incorporated herein by reference;

It is ADJUDGED, ORDERED and DECREED that the plaintiffs' facial and "as applied" constitutional challenges to City of Virginia Beach Ordinance §23-47 are denied, to which plaintiffs' objections and exceptions are duly noted as set forth below. Accordingly, the subject litigation is dismissed, with prejudice.

It is so ORDERED.

ENTER:

/s/
The Honorable A. Joseph Canada, Jr.

4-21-08
CERTIFIED TO BE A TRUE COPY
OF RECORD IN MY CUSTODY
TINA. E. SINNEN, CLERK
CIRCUIT COURT, VIRGINIA BEACH, VA
BY/s/
DEPUTY CLERK

I ask for this:

/s/
Christopher S. Boynton
Senior City Attorney
Counsel for the City of Virginia Beach

Seen and respectfully objected to for the reasons argued to the court and set forth in the pleadings, memoranda, letters and legal authority previously submitted. Additionally, plaintiffs note these particular objections: (1) facially and according to the evidence submitted on the "as applied" challenge, the subject ordinance violates due process, equal protection and free speech/expression principles guaranteed by the Virginia Constitution; (2) the court's latter opinion/ruling ("the opinion" mischaracterizes the nature of the leave to amend that was granted with respect to the First Amended Complaint (i.e., the leave to amend was general in nature, and not limited to the "as applied" challenge); (3) the opinion fails to address and rule on the vagueness and free speech/expression challenges brought by the plaintiffs; (4) the opinion fails to address and resolve the conflicting facts set forth in the record, especially the conflicting (and often self-contradicting) testimony offered by Virginia Beach police officers; (5) the opinion fails to recognize and give sufficient weight to the unrebutted evidence of the plaintiffs and the concessions and admissions of the police and defense witnesses; (6) the opinion makes the erroneous ruling that there is no constitutional violation presented where the police possess "unfettered discretion" in law enforcement and/or where it is established factually that "the ordinance is enforced inconsistently and selectively."

/s/ _____

Kevin E. Martingayle
Counsel for Plaintiffs Bradley S. Tanner,
Eric Alexander Williams and
BAE Ventures, Inc. t/a

The Peppermint Beach Club

Bradley S. Tanner, Eric Alexander Williams and BAE Ventures, Inc. t/a The Peppermint Beach Club v. The City of Virginia Beach, Case No.: CL07-3754

[ENTERED APRIL 8, 2008]

COMMONWEALTH OF VIRGINIA

EDWARD W. HANSON, JR.
THOMAS S. SHADRICK
FREDERICK B. LOWE
A. BONWILL SHOCKLEY
H. THOMAS PADRICK, JR.
A. JOSEPH CANADA, JR.
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SECOND JUDICIAL CIRCUIT

Direct Dial: 757-385-4262

April 8, 2008

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Virginia Beach, VA 23456-9004
Re: Tanner, et al. v: City of Virginia Beach
Docket No.: CL07-3754

Dear Counsel:

Plaintiffs, Bradley Tanner, Eric Alexander Williams, and BAE Ventures, Inc., trading as the Peppermint Beach Club (hereinafter "the Peppermint"), filed suit against Defendant, the City of Virginia Beach (hereinafter "the City"). Tanner and Williams own and operate the Peppermint, a restaurant and entertainment venue located at 1801 Atlantic Avenue in Virginia Beach. Plaintiffs seek to declare unconstitutional Virginia Beach Ordinance § 23-47. Section 23-47 is a class four (4) misdemeanor noise ordinance. The plaintiffs allege that over the past year, they have been repeatedly charged with violations of the noise ordinance. They allege that the ordinance is facially unconstitutional because it is overly vague.

The plaintiffs also claim that the ordinance is unconstitutional as applied by the Virginia Beach Police Department. The plaintiffs allege that law enforcement officials possess unfettered discretion in deciding whether to charge individuals with violations of the ordinance. The plaintiffs allege that officers have testified that a decision to charge a violation of the ordinance is a matter of opinion and admit that violations have routinely been alleged without any underlying citizen complaints at all. The plaintiffs indicate that the police, citizens, and Virginia Beach judges have been unable to identify

and utilize any consistent standards with regard to this noise ordinance, and the result has been utter chaos.

On September 7, 2007, this Court denied the plaintiffs motion for a temporary injunction. Furthermore, this Court sustained the City's Demurrer to Plaintiffs' Complaint as to the facial validity of the City's Noise Ordinance, and dismissed that claim with prejudice. This Court granted Plaintiffs leave to amend their Complaint, limited to their "as-applied" challenge.

On February 28, 2008, a hearing was held in order for the Court to hear additional testimony and evidence as to the as-applied challenge. This matter was taken under advisement at the conclusion of the hearing. The Court has now reached a final decision in this matter.

Plaintiffs' Facial Challenge to
Virginia Beach City Code S 23-47

The plaintiffs once again set forth their argument as to why this Court should declare the Virginia Beach Noise Ordinance facially unconstitutional. The Court acknowledges that the plaintiffs are fully within their rights to proffer such argument, despite the previous dismissal of this claim. However, the petitioners fail to persuade this Court to reverse its earlier ruling. Therefore, the Court denies the plaintiffs' facial challenge based upon the reasons set forth in the Court's letter opinion dated August 13, 2007.

Plaintiffs' As-Applied Challenge to § 23-47

The Equal Protection Clause of the 14th Amendment provides that no state shall "deny to any person the... Equal Protection of the laws." U.S. Const. Amend. XIV, § 1. The application of the Equal Protection Clause prevents a state from prosecuting individuals for certain crimes based upon "an unjustifiable standard such as race, religion, or other arbitrary classification." *Branche v. Commonwealth,* 25 Va. App. 480, 486 (1997) (quoting *City of Clebume v. Clebume Living Center,* 473 U.S. 432, 439 (1985)). However, unequal application of the law, absent such discriminatory purpose, does not trigger an equal protection violation. *Sims v. Cunningham,* 203 Va. 347, 352 (1962).

In *Sims v. Cunningham,* the Virginia Supreme Court addressed selective enforcement of the law in regards to a habitual offender statute. *Id.* at 349. Sims received an additional ten year jail sentence due to his status as a repeat offender. *Id.* Sims asserted in his habeas corpus petition that the applicable statute, as applied, denied him the equal protection of the laws. *Id.* at 351. Specifically, Sims pointed out that the Commonwealth failed to sentence other individuals who qualified as habitual offenders under the statute. *Id.*

The Court indicated that the Commonwealth adopted a deliberate policy to invoke the provisions of the statute only against Virginia offenders. *Id.* at 352. However, the Court found that Sims failed to meet his burden to show clear, intentional, or purposeful discrimination. For, "the unlawful

administration by State officers of a State statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful **discrimination**." *Id.* (quoting *Snowden v. Hughes*, 321 U.S. 1, 8 (1944) (emph. added).

The testimony in this case unequivocally establishes that the enforcement of the noise ordinance is selective and uneven. The police generally adhere to an "across the street" rule to measure the noise emanating from an establishment. However, the acceptable level of noise differs based on the ambient noise of the surrounding area. Virginia Beach police officers possess wide discretion in determining whether music violates the ordinance, and the ordinance is not enforced the same throughout the city. Until recently, a third party complaint was not even required before the issuance of a citation.

The "across the street" rule is also relaxed, and possibly abandoned, in regards to outdoor entertainment Testimony established that music from the outdoor stages at the Virginia Beach oceanfront, especially the Hilton Hotel on 31st Street, is louder then the music emanating from the Peppermint Lounge or other oceanfront clubs. The City is unable to point to any specific complaints from citizens due to noise emanating from the Peppermint Lounge. In contrast, one witness testified that he complained to the city over one-hundred times about outdoor music levels.

In order to prove their claim, the plaintiffs must present clear evidence to rebut the presumption that a state did not violate his equal protection rights. See *Branche, supra* at 486. The plaintiffs must "show both... a [resultant] criminal effect and that [the discriminatory effect] was motivated by a discriminatory purpose." *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985). The plaintiffs fail to meet this burden.

The plaintiffs succeed in demonstrating that other persons similarly situated were not prosecuted. However, the plaintiffs fail to address any unjustifiable standard by which the police department enforces this ordinance. See e.g. *Boyd v. County of Henrico*, 42 Va. App. 495, 522 (2004) (a selective prosecution claim requires a showing that the charges were brought for reasons forbidden by the Constitution). The fact that the police may possess "unfettered discretion" in enforcement does not raise this constitutional issue. Nor does the fact that the ordinance is enforced inconsistently and selectively. See *Malibu Auto Parts v. Comm.*, 218 Va. 467 (holding that territorial uniformity in prosecution is not a constitutional pre-requisite).

For these reasons, the plaintiffs' as-applied challenge to § 23-47 is denied.

Very truly yours,

/s/
A. Joseph Canada, Jr.

AJC,jr:dls

[ENTERED SEPTEMBER 7, 2007]

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

BRADLEY S. TANNER,

ERIC ALEXANDER WILLIAMS

and

BAE VENTURES, INC. t/a
THE PEPPERMINT BEACH CLUB,

Plaintiffs,

v. Case No. CL07-3754

CITY OF VIRGINIA BEACH,

Defendant.

ORDER

On the 11th day of July, 2007, came the parties, by counsel, upon the Complaint and Motion for a temporary injunction filed by Plaintiffs and the Demurrer filed by the Defendant, City of Virginia Beach. An *ore tenus* hearing was held on the temporary injunction motion, and counsel for the parties argued the matter. The parties, by counsel, again came before the Court on September 7, 2007 upon the Defendant's motion for entry of order, upon the Plaintiffs' Motion for Reconsideration, and upon the Plaintiffs' Motion for Leave to Amend.

Upon consideration of Virginia Beach City Code Section 23-47, the pleadings, motions, and memoranda, applicable law, testimony and evidence, and the arguments of counsel, the Court hereby **OVERRULES** Plaintiffs' Motion for a temporary injunction.

Further, upon consideration of Virginia Beach City Code Section 23-47, the pleadings, motions, and memoranda, applicable law, and the arguments of counsel, the Court hereby **SUSTAINS** the City's Demurrer as to the facial validity of Virginia Beach City Code § 23-47, and **OVERRULES** the City's Demurrer as to the as-applied challenge to § 23-47. The Court further **GRANTS** Plaintiffs leave to amend, and deems the First Amended Complaint **FILED.** The Court further **ORDERS** that the as-applied challenge be set for an evidentiary hearing. This order is without prejudice to the City's right to file and have heard a Demurrer or other responsive pleading to the First Amended Complaint, which shall be filed on or before September 28, 2007. The Court **DISMISSES, WITH PREJUDICE,** Plaintiffs' Facial Challenge to Virginia Beach City Code § 23-47; however this is not a final order and no portion of this order shall be construed as or become final until all claims and counts asserted in this action are dispositively resolved by the Court.

It is so ordered.

Entered, *nunc pro tunc*, this 7th day of September, 2007.

/s/ _____
Hon. A. Joseph Canada, Jr., Judge

I ask for this, save and except for the Court's overruling the City's Demurrer as to the as-applied challenge, to which the City objects for the reasons set forth in the pleadings, motions, and memoranda and at the hearings:

/s/ _____
Christopher S. Boynton, Senior City Attorney
Counsel for the City of Virginia Beach

Seen and Objected to for the Reasons Set Forth
In the Pleadings, Motions and Memoranda, and at the Hearings, and in accordance with all arguments and authority presented to the Court:

/s/ _____
Kevin E. Martingayle, Esquire
Counsel for Plaintiffs

CERTIFIED TO BE A TRUE COPY
OF RECORD IN MY CUSTODY
TINA E. SINNEN, CLERK
CIRCUIT COURT, VIRGINIA BEACH, VA
BY /s/ _____
DEPUTY CLERK

[ENTERED AUGUST 13, 2007]

COMMONWEALTH OF VIRGINIA

EDWARD W. HANSON, JR.
THOMAS S. SHADRICK
FREDERICK B. LOWE
A. BONWILL SHOCKLEY
H. THOMAS PADRICK, JR.
A. JOSEPH CANADA, JR.
PATRICIA L. WEST
STEPHEN C. MAHAN
WILLIAM R. O'BRIEN

CIRCUIT COURT
CITY OF VIRGINIA BEACH
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SECOND JUDICIAL CIRCUIT

Direct Dial: 757-385-4262

August 13, 2007

Christopher S. Boynton, Esq.
Office of the City Attorney
2401 Courthouse Dr.
Virginia Beach, VA 23456-9004

Kevin E. Martingayle, Esq.
Stallings & Bischoff, P.C.

P.O. Box 1687
Virginia Beach, VA 23451-4160

Re: Bradley S. Tanner, Eric Alexander Williams and BAE Ventures, Inc.
v. The City of Virginia Beach
Docket No.: CL 07-3754

Dear Counsel:

I have received your briefs and rule as follows:

INJUNCTION

In order to obtain the issuance of a temporary/preliminary injunction, the moving party must show:

1. There must be no adequate remedy at law;
2. An injunction would be an effective and enforceable means of redressing the problem;
3. The likelihood of irreparable harm to the Plaintiff and the harm to the Defendant if an injunction is granted. If the balance of the hardships test results in a finding that the harm to the plaintiff greatly outweighs that to the defendant, then this is enough to permit issuance of the injunction;
4. If the harm to the plaintiff does not greatly outweigh the harm to the defendant, then the plaintiff has the burden of proving that it is likely to succeed on the merits.

5. Finally, the court must consider whether issuance of an injunction would serve the public interest.

Plaintiffs seek a temporary injunction to enjoin the City of Virginia Beach from enforcing the noise ordinance while this suit is pending. It is unclear whether Plaintiffs are trying to enjoin the enforcement of the ordinance against anyone, or just against themselves. Either way, it is not an appropriate remedy at this stage in the proceeding. Plaintiffs do not show sufficient irreparable harm if the ordinance is allowed to be enforced. On the other hand, the City will suffer a great deal of harm if they are prohibited from enforcing one of its laws. Furthermore, Plaintiffs are unable to show a likelihood of success on the merits at this point, given the prior case law that leans heavily in favor of the City. Lastly, it would not serve the public interest to place restraints on the City's ability to regulate the behavior of its citizens and establishments. Plaintiffs' request for a temporary injunction is overruled.

DEMURRER

Judge Lowe previously ruled on the issue of whether § 23-47 is facially unconstitutional. IN the case of Feeney v. City of Virginia Beach (CH03-3636), Judge Lowe sustained the City's demurrer regarding the facial validity of the statute. His order states:

> Upon consideration of the language employed in Virginia Beach City Code

> section 23-47 and the case law relating to similar ordinances, the Court finds as a matter of law that Virginia Beach City Code section 23-47 is not facially vague or overbroad and does not, as written, violate any due process or equal protection rights guaranteed by the Virginia Constitution. Likewise, the Court finds that the ordinance on its face meets an objective and reasonable standard and that section 23-47, to the extent it is enforced consistent with its terms, does not violate any right to freedom of express guaranteed by the Virginia Constitution.

As this issue has previously been ruled upon, the demurrer is sustained and the matter is dismissed. Mr. Boynton is to prepare and circulate an order consistent with this ruling.

Sincerely,

/s/
A. Joseph Canada, Jr.

AJC,jr:dls

[ENTERED JUNE 12, 2009]

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 12th day of June, 2009.

Bradley S. Tanner, et al., Appellants,

against Record No. 080998
Circuit Court No. CL07-3754

City of Virginia Beach, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 17th day of April, 2009 and grant a rehearing thereof, the prayer of the said petition is denied.

A, Copy,

Teste:

Patricia L. Harrington, Clerk

By: *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court*

Deputy Clerk

[FILED SEPTEMBER 27, 2007]

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

BRADLEY S. TANNER,
ERIC ALEXANDER WILLIAMS
and
BAE VENTURES, INC. t/a
THE PEPPERMINT BEACH CLUB,

Plaintiffs,

v. Case No. CL07-3754

CITY OF VIRGINIA BEACH,

Defendant.

DEMURRER

COMES NOW the City of Virginia Beach ("City"), by counsel, and files its Demurrer to Plaintiffs' First Amended Complaint, on the following grounds:

1. Plaintiffs contend the City's Noise Ordinance (Virginia Beach City Code § 23-47) is unconstitutional under the Virginia Constitution, both on its face and as applied. Plaintiffs seek declaratory and injunctive relief from its enforcement.

2. Following an extensive temporary injunction hearing on July 11, 2007 – during which

Plaintiffs called almost a dozen witnesses – the Court denied the temporary injunction.

3. The Court sustained the City's Demurrer to Plaintiffs' Complaint as to the facial validity of the City's Noise Ordinance, and dismissed that claim.

4. The Court granted Plaintiffs leave to amend their Complaint, limited to their "as-applied" challenge. This Demurrer is in response to the "as applied" challenge as asserted in Plaintiff's First Amended Complaint. No response is required to the facial challenge contained in the First Amended Complaint, since that claim was dismissed with prejudice by the Court's September 7, 2007 ruling and Order.

5. Plaintiffs' "as applied" challenge is found primarily at paragraphs 5 and 6 of the First Amended Complaint.

6. Plaintiffs assert in paragraph 5 that "...'as applied', the ordinance has been utilized in a subjective and 'selective manner, in violation of rights guaranteed by the Virginia Constitution"

7. Plaintiffs assert in paragraph 6 that "[a]s applied and enforced, the subject ordinance is unlawful and violates the Virginia Constitution because law enforcement officials in Virginia Beach exercise unfettered individual discretion in deciding whether to charge individuals with noise ordinance violations..." They further contend that some City police officers have stated the decision to charge a

violation is a matter of opinion, and that sometimes charges are made without private citizen complaints.

8. The remainder of the Complaint chronicles several Virginia Beach general district and circuit court prosecutions under the City Noise Ordinance that had a variety of outcomes with a variety of judges based upon a variety of operative facts. While some judges have declined to convict certain defendants, and some have offered dicta from the bench about how the ordinance would be better enforced, no judge to date has found the City Noise Ordinance unconstitutional, either facially or as-applied. Rather, several have patently refused to find the ordinance unconstitutional even where they have declined to convict a defendant under the facts of the case at hand.

9. The allegations contained in the First Amended Complaint, even when taken as true for purposes of Demurrer, and combined with any fair inferences or implications, simply do not assert that Plaintiffs are engaged in protected conduct or speech when they are cited for "unreasonably loud, disturbing and unnecessary" noise and are having their constitutional rights infringed upon by the enforcement of this content-neutral ordinance.

10. Where an ordinance is a content-neutral regulation of conduct that does not unduly burden any protected speech, Plaintiffs cannot claim they were targeted for constitutionally suspect reasons. *Boyd v. Henrico*, 42 Va. App. 495, 522 (2004). As the Virginia Court of Appeals wrote in that case:

> "Appellants' as-applied selective enforcement claim fails for the same reason their content-based attack fails: The dancers have no First Amendment right to wear pasties and G-strings rather than the lingerie-like tops and bottoms required by the Henrico ordinance. Because the ordinance involves a content-neutral regulation of conduct that does not unduly burden any protected erotic speech, appellants cannot claim they were being targeted for constitutionally suspect reasons. Put another way, appellants cannot show that Henrico prosecuted them "*because* of" their expression of constitutionally protected speech."

Id. (internal citation omitted). Just as the appellants in the Boyd case had no constitutionally protected right to wear pasties and G-strings, Plaintiffs in this action have no constitutional right to play unreasonably loud, disturbing and unnecessary music that can be heard across or down the street from their indoor establishment.

11. Plaintiffs' First Amended Complaint wholly fails to state a claim that the City has applied or enforced the Noise Ordinance in a manner that unlawfully infringes upon any constitutionally protected free speech rights.

12. Moreover, as the Virginia Court of Appeals has observed: "Although actual selective enforcement of a statute might give rise to an equal

protection challenge,... the statute itself will not be struck down 'unless its clarity has been 'designedly avoided so as to allow the net to be cast at large.'" *Tjan v. Commonwealth*, 46 Va. App. 698, 710 (2005) (internal citations omitted).

13. Here, the only remedy Plaintiffs seek is for the ordinance to be struck down. This remedy is plainly not available to Plaintiffs based upon their allegations in the First Amended Complaint.

14. Moreover, while Plaintiffs allegations at paragraph 19 challenge facially the City Noise Ordinance, stating "this type of blanket prohibition violates free speech, due process and equal protection rights guaranteed by the Virginia constitution," their facial challenge was previously dismissed and further, Plaintiffs have not alleged either that they are members of a protected class or that their equal protection rights have been violated.

15. Finally, plaintiffs seek injunctive relief and asserts in paragraph 21 that "Plaintiffs are sustaining ongoing, irreparable harm and their constitutional rights are being violated." The only "facts" alleged in support of this conclusory allegation of irreparable harm are found in paragraph 4 of the First Amended Complaint.

16. In that paragraph, Plaintiffs allege: they "have been charged, repeatedly, with violations" of the ordinance; "they have also been threatened with arrest and detention in jail even though the subject ordinance is a Class 4 misdemeanor punishable by nothing more than a fine;" it is "very

unsettling, disturbing, and upsetting to them;" it has significantly impaired their ability to conduct business;" enforcement of the ordinance in the past month is at "the point of being intolerable."

17. Nothing in these allegations remotely constitutes irreparable harm, and in fact, Plaintiffs concede that all harms alleged are of either a financial or minor emotional nature. Plaintiffs further concede that nobody has been arrested under the Ordinance since, as Plaintiffs' correctly point out, a Noise Ordinance violation is a Class 4 misdemeanor subject only to fines.

18. Because Plaintiffs have failed to state sufficient facts to assert a claim that the City's Noise Ordinance is unconstitutional as applied to them, or that they are suffering irreparable harm and are without an adequate remedy at law, the Demurrer should be sustained and the case dismissed.

WHEREFORE, for the foregoing reasons, the City respectfully requests that its Demurrer be granted and the First Amended Complaint be dismissed with prejudice.

CITY OF VIRGINIA BEACH

By: /s/ _____
Of Counsel

Mark D. Stiles (VSB No. 30683)
Deputy City Attorney
Christopher S. Boynton (VSB No. 38501)
Senior City Attorney
Office of the City Attorney
2401 Courthouse Drive, Building 1
Virginia Beach, VA 23456
(757) 385-4531- Telephone
(757) 385-5687- Facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Demurrer was faxed and mailed to Kevin E. Martingayle, Esquire, Stallings & Bischoff, P.C., 2101 Parks Avenue, Suite 801, Virginia Beach, Virginia 23451 this 27th day of September, 2007.

/s/
Christopher S. Boynton

[FILED JULY 6, 2007]

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

BRADLEY S. TANNER,
ERIC ALEXANDER WILLIAMS
and
BAE VENTURES, INC. t/a
THE PEPPERMINT BEACH CLUB,

Plaintiffs,

v. Case No. CL07-3754

CITY OF VIRGINIA BEACH,

Defendant.

DEMURRER

COMES NOW the City of Virginia Beach ("City"), by counsel, and demurs to the Complaint for Declaratory Injunctive Relief [sic] ("Complaint"), filed herein by the Plaintiffs on the following grounds:

1. Plaintiff's Complaint challenges the constitutionality of the City's Noise Ordinance (codified at Virginia Beach City Code § 23-47), and seeks declaratory and injunctive relief from its enforcement.

2. Paragraph 5 of the Complaint asserts that "[o]n its face, the subject noise ordinance is

legally defective and violates the Virginia Constitution because it is overly vague, contains no standards or criteria for enforcement, and fails to provide citizens with 'fair notice' of what specific conduct is unlawful."

3. The City's Noise Ordinance is attached and incorporated into the Complaint and therefore may be considered for purposes of this Demurrer.

4. The rules of statutory construction require the Court to interpret the ordinance according to its terms and give all words employed therein their commonly accepted meanings.

5. The ordinance, by its terms, provides an objective and reasonable standard. It prohibits "any unreasonably loud, disturbing and unnecessary noise." It simply requires that Plaintiffs, like all establishments, play any music they may choose to play inside at such volume and under such conditions and at such times so as to not unreasonably disturb those persons who choose not to be patrons of the Plaintiffs' establishment.

6. In a prior case filed by attorney for Plaintiffs challenging this exact same ordinance, *Christopher Feeney et al v. City of Virginia Beach*, Chancery No. CH03-3636, the Honorable Frederick B. Lowe of this Court sustained the City's demurrer and entered an Order explicitly upholding the constitutionality of the City's Noise Ordinance (copy attached as Exhibit 1). In that Order, Judge Lowe wrote:

> Upon consideration of the language employed in Virginia Beach City Code Section 23-47 and the case law relating to similar ordinances, the Court finds as a matter of law that Virginia Beach City Code Section 23-47 is not facially vague or overbroad, and does not, as written, violate any due process or equal protection rights guaranteed by the Virginia Constitution. Likewise, the Court finds that the ordinance on its face meets an objective and reasonable standard and that Section 23-47, to the extent it is enforced consistent with its terms, does not violate any right to freedom of expression guaranteed by the Virginia Constitution." (emphasis added)

7. The Virginia Supreme Court has also previously considered the City's Noise Ordinance and found it to be constitutional. In *City of Virginia Beach v. Murphy*, 239 Va. 353, 389 S.E.2d 462 (1990), the Supreme Court reversed Judge Austin Owen, who had found the City's Noise Ordinance unconstitutional after the defendant was prosecuted for loud music emanating from her restaurant (copy attached as Exhibit 2). In that case, the legal issue was not vagueness or overbreadth, but rather whether the illegal conduct constituted a private nuisance or a public nuisance. Importantly, in ruling that the conduct punishable under the City's Noise Ordinance was a public nuisance and that the ordinance was constitutional, the Court wrote that "the right not to be subjected to 'unreasonably loud,

disturbing and unnecessary noise' as provided in Virginia Beach Code § 23-47, is 'common to all members of the general public...' and not particular to individuals in the enjoyment of their property." *Id.* at 356, 464.

8. When the City's Noise Ordinance is enforced consistent with its terms, the Ordinance sufficiently identifies and defines the conduct it prohibits and, as a matter of law, is not unconstitutionally vague or overbroad.

9. Paragraph 6 of the Complaint asserts that "as applied and enforced, the subject ordinance is unlawful and violates the Virginia Constitution because law enforcement officials in Virginia Beach exercise unfettered individual discretion in deciding whether to charge individuals with noise ordinance violations."

10. The allegations in Paragraph 6 of the Complaint, even when combined with the few factual allegations contained in the Complaint (specifically that the decision to charge a violation is "...purely a matter of opinion..." and that violations are "...often alleged without any underlying citizen complaints...") fails to state a claim that the City has applied or enforced the Noise Ordinance in an unlawful or unconstitutional manner.

11. Nowhere in the City's Noise Ordinance is its required that there be an underlying citizen complaint. Therefore, charging a violation in the absence of a complaining witness (other than a police officer) constitutes enforcement of the ordinance

consistent with its terms.

12. Moreover, the Virginia Supreme Court, in *Murphy,* wrote that "the distinction between a public and a private nuisance does not depend solely upon the number of people who are *actually affected*, as the trial court held." The Court continued:

> "As one jurisdiction has noted: If the annoyance is one that is common to the public generally, then it is a public nuisance... The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence."

Id. at 356, 463 (quoting *Couture v. Bd. Of Educ. of Town of Plainfield*, 6 Conn.App. 309, 315, 505 A.2d 432, 435 (1986) (internal citation omitted)) (emphasis added).

13. Clearly, the Virginia Supreme Court, in sustaining this Ordinance once previously, contemplated that a violation could occur, be prosecuted and a conviction be obtained, all in the absence of a citizen complaint.

14. Moreover, the assertion that an officer's decision to charge a violation of the Ordinance is "purely a matter of opinion" is simply not accurate. While officers

necessarily employ some level of discretion in making a decision to charge a person with a Noise Ordinance violation, they employ that same level of discretion every day in deciding whether to write a speeding ticket, to charge a person for public intoxication, or to issue a ticket for failing to come to a complete stop at a road sign or signal.

15. The Noise Ordinance under which an officer initiates a charge requires, on its face, that the officer make a determination that the noise is "unreasonably loud, disturbing and unnecessary" and/or is sufficient to "annoy or disturb the quiet, comfort or repose of reasonable persons." This standard has already been ruled by this Court to be an "objective and reasonable standard." The officer cannot make the charge unless he determines that probable cause exists to conclude that the defendant has violated this objective and reasonable standard.

16. If an officer's conclusion that the ordinance has been violated – which was made based upon his or her in-person observations – does not convince the trier of fact, beyond a reasonable doubt, that the reasonable person standard has been violated, then the defendant is properly found not guilty.

17. Each charge must rise and fall on its own individual facts, but the decision to charge is not without an objective and

reasonable standard.

18. At paragraph 14, Plaintiffs allege that "the police are habitually bringing charges that cannot be proved in court." However, in 7 of the 8 instances cited in Plaintiffs' Complaint (paragraphs 10-13), the Virginia Beach General District Court found the evidence sufficient and convicted the defendant, only to have the Circuit Court later try the case *de novo*, and dismiss the charge. In the eighth instance, the officer failed to appear. Therefore, Plaintiffs' own Complaint admits that these cases can and are often proved beyond a reasonable doubt to a judge under the existing Ordinance.

19. Finally, plaintiff seeks injunctive relief and asserts in paragraph 17 that "Plaintiffs are sustaining ongoing, irreparable harm and their constitutional rights are being violated." The only "facts" alleged in support of this conclusory allegation of irreparable harm are found in paragraphs 4 and 14 of the Complaint.

20. In those paragraphs, Plaintiffs allege: they "have been charged, repeatedly, with violations" of the ordinance; "they have also been threatened with arrest and detention in jail even though the subject ordinance is a Class 4 misdemeanor punishable by nothing more than a fine;" it is "very unsettling, disturbing, and upsetting to them;" it has significantly impaired their

ability to conduct business;" enforcement of the ordinance in the past month is at "the point of being intolerable;" and (in paragraph 14) that prosecutions under the ordinance are being done at "great expense, both financial and emotional, to the defendants, and in a manner which wastes judicial resources."

20. Nothing in these allegations remotely constitutes irreparable harm, and in fact, Plaintiffs concede that all harms alleged are of either a financial or minor emotional nature. Plaintiffs further concede that nobody has been arrested under the Ordinance since, as Plaintiffs' correctly point out, a Noise Ordinance violation is a Class 4 misdemeanor subject only to fines.

21. Because Plaintiffs have failed to state a claim, as a matter of law, that the City's Noise Ordinance is unconstitutionally vague or overbroad on its face, or that it is unlawful or violative of the Virginia Constitution as applied, the Demurrer should be sustained and the case dismissed. Moreover, Plaintiffs' have wholly failed to state sufficient facts to allow a court to find irreparable harm or issue an injunction.

22. Finally, Plaintiffs essentially ask the Court to substitute its judgment for that of the legislative body as to how best to regulate excessive noise. This request violates the separation of powers doctrine and should be rejected as a matter of law.

WHEREFORE, for the foregoing reasons, the City respectfully requests that its Demurrer be granted and the Complaint for Declaratory Injunctive Relief be dismissed with prejudice.

CITY OF VIRGINIA BEACH

By: /s/
Of Counsel

Mark D. Stiles (VSB No. 30683)
Deputy City Attorney
Christopher S. Boynton (VSB No. 34731)
Senior City Attorney
Office of the City Attorney
2401 Courthouse Drive, Building 1
Virginia Beach, VA 23456
(757) 385-4531- Telephone
(757) 385-5687- Facsimile

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Demurrer was faxed and mailed to Kevin E. Martingayle, Esquire, Stallings & Bischoff, P.C., 2101 Parks Avenue, Suite 801, Virginia Beach, Virginia 23451 this 6th day of July, 2007.

/s/
Christopher S. Boynton

[FILED SEPTEMBER 6, 2007]

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

BRADLEY S. TANNER,
ERIC ALEXANDER WILLIAMS and
BAE VENTURES, INC. t/a
THE PEPPERMINT BEACH CLUB,

Plaintiffs,

v. Case No. CL07-3754

THE CITY OF VIRGINIA BEACH,

Defendant.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

NOW COME your plaintiffs, Bradley S. Tanner (hereinafter "Tanner"), Eric Alexander Williams (hereinafter "Williams") and BAE Ventures, Inc. t/a The Peppermint Beach Club (hereinafter "The Peppermint"), by counsel, and in support of their complaint, state as follows:

1. Tanner is a resident of the City of Suffolk and Williams is a resident of the City of Virginia Beach.

2. The Peppermint is a Virginia corporation operating as a restaurant and entertainment venue located at 1801 Atlantic

Avenue in the City of Virginia Beach.

3. The City of Virginia Beach (hereinafter "the City") is a municipal corporation created and in existence pursuant to applicable provisions of the Code of Virginia. Among other functions, the City operates a police department. Additionally, the City has created and passed into law certain ordinances, including one which is the subject of this complaint, §23-47.

4. Tanner and Williams are owners and operators of The Peppermint. Over the past year or more, they have been charged, repeatedly, with violations of City ordinance §23-47, always because of music volume. In addition to the times when they have been issued summonses, they have also been threatened with arrest and detention in jail, even though the subject ordinance is a Class 4 misdemeanor punishable by nothing more than a fine. Obviously, this has been very unsettling, disturbing and upsetting to them, and it has significantly impaired their ability to conduct business at The Peppermint, and has damaged the ability of The Peppermint to conduct business and satisfy its customers. Enforcement of the ordinance has been stepped up significantly in recent months to the point of being intolerable.

5. On its face, the subject noise ordinance is legally defective and violates the Virginia Constitution because it is overly vague, contains no standards or criteria for enforcement, and fails to provide citizens with "fair notice" of what specific conduct is unlawful. Moreover, this ordinance

violates free speech and expression rights guaranteed by the Virginia Constitution. Facially, the noise ordinance invites selective prosecution and, "as applied", the ordinance has been utilized in a subjective and selective manner, in violation of rights guaranteed by the Virginia Constitution.

6. As applied and enforced, the subject ordinance is unlawful and violates the Virginia Constitution because law enforcement officials in Virginia Beach exercise unfettered individual discretion in deciding whether to charge individuals with noise ordinance violations. Over the years, City police officers have testified in numerous attempts at prosecution of the ordinance that the decision to charge a violation of the ordinance is purely a matter of opinion, and have further admitted that violations have routinely been alleged without any underlying citizen complaints at all. Accordingly, potential violators of the noise ordinance are left guessing as to whether or not their conduct is "criminal", and numerous witnesses have testified that they are unable to tell when they are acting in a manner that violates the noise ordinance. Witnesses have also testified that from their perspective, they are not acting in a manner which violates the ordinance. Notwithstanding, these witnesses have endured criminal charges, with unpredictable and inconsistent results being reached in the courtroom when their cases have been tried. Currently, the police, citizens and Virginia Beach judges have been unable to identify and utilize any consistent standards with regard to the noise ordinance, and the result has been utter chaos.

7. Special rules of statutory construction apply to penal statutes, which are strictly construed against the government and may not be extended by implication. *Stevenson v. City of Falls Church*, 243 Va 3 434, 436 (1992). Lack of sufficient "definiteness" and "clear and unequivocal tests to ascertain guilt" will lead to penal statutes being invalidated. *Goldstein v. Commonwealth*, 200 Va. 25,27-28 (1958) (obscenity statute struck down). If "a person could not receive fair notice of the relevant law by reading [the] penal ordinance", it is unenforceable. *Rollins v. Gordonsville*, 216 Va 25, 26 (1975). "We have often held that a penal statute must be definite and certain to be valid, and it denies due process of law if it is vague .or ambiguous." *Sharp v. Commonwealth*, 213 Va. 269, 271 (1972) (internal citations omitted). "The Constitution does not permit the legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who should be rightfully detained, and who should be set at large." *Chicago v. Morales*, 527 U.S. 41, 60 (1999) (internal citations omitted) (invalidating an anti-loitering ordinance). See also *Booth v. Commonwealth*, 197 Va. 177 (1955) (declaring the term "improper person" to be unconstitutionally vague and indefinite in the context of an alcohol interdiction order); *Squire v. Pace*, 380 F. Supp. 269, (W.D. Va. 1974), affd. 516 F. 2d 240 (4th Cir. 1975), cert, denied 423 U.S. 840 (1975) (granting *habeas corpus* and striking down on both free speech and vagueness grounds a Virginia "disorderly conduct" statute). As these cases and others make perfectly clear, the requirement of certainty in penal statutes and ordinances is fundamental to American

jurisprudence. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy ordinance ruled void for vagueness); *Coleman v. City of Richmond*, 5 Va. App. 459 (1988) reh'g. denied, 6 Va. App. 296 (1988) (invalidating Richmond ordinance prohibiting loitering in a public place under circumstances manifesting the purpose of engaging in prostitution).

8. In the specific context of noise ordinances, cases from many jurisdictions around the United States constitute strong and persuasive authority in support of plaintiffs' arguments that the standardless Virginia Beach noise ordinance is invalid because it violates free speech, equal protection and due process rights guaranteed by the Virginia Constitution. See, e.g., *U.S. Labor Party v. Pomerleau*, 557 F. 2d 410 (4th Cir. 1977): *People v. New York Trap Rock Corp.*, 57 N.Y. 2d 371, 456 N.Y.S. 2d 711 (N.Y. 1982); *Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486 (C.A.4 (NC) 1983); *Fratiello v. Mancuso*, 653 F. Supp. 775 (R.I. 1987): *Lanaford v. City of Omaha*, 755 F. Supp. 1460 (Neb. 1989): *Vae..Woo.Kimy..City of New York*, 774 F. Supp. 164 (S.D. N.Y.1991); *Nichols v. City of Gulfport*, 589 So. 2d 1280 (Miss. 1991); *Asauith v. City of Beaufort*, 911 F. Supp. 974 (S.C. 1995); *Duores v. Citv of Newport. R.I.*, 978 F. Supp. 429 (D. R.I. 1997); *Lionhart v. Foster*, 100 F. Supp. 2d 383 (E.D, La. 1999): *Thelen v. State*, 526 S.E. 2d 60 (Ga. 2000); *Deeganv. Citv of Ithaca*, 444 F.3d 135 (2nd Cir. 2006). Copies of these cases have all been filed with the Court previously. In each of these cases, the subject noise ordinance was at feast .as specific as the Virginia Beach noise ordinance, and in some

cases much more specific, and yet in each instance, the ordinance failed to pass muster and was deemed to violate constitutional rights.

9. The Virginia Beach courts have been the site of a great deal of prior litigation involving the Virginia Beach noise ordinance. The subject dispute involves music emanating from a restaurant located at 1801 Atlantic Avenue. Notably, the restaurant is on the ground floor of a hotel, and the owners/operators of The Peppermint have had no citizen or hotel complaints concerning the music volume at the restaurant. Nevertheless, the police continue to allege violations and have even threatened arrest.

10. In 2003, other individuals associated with the predecessor restaurant at this same location mounted a challenged to the subject ordinance in Feeney, et. al. v. City of Virginia Beach, CH03-3636. The case proceeded before the Honorable Frederick B. Lowe on the initial question of whether the ordinance is facially defective. Judge Lowe found that it was not, but left for future determination the issue of whether it was being applied selectively and unconstitutionally. However, before any further determinations could be made, the case was non-suited because the City and Virginia Department of Alcoholic Beverage Control effectively drove the restaurant out of business. However, less than one month after Judge Lowe entered an order in Feeney. he presided over Commonwealth v. John Leonard Lewis, CR03-2866-00, CR03-2996-00; CR03-2996-01; CR03-4413-00 and CR03-4751 (5 charges/incidents consolidated for

trial). The case involved music volume at a restaurant located diagonally across the street from where The Peppermint is now, and it was tried on July 15, 2004. All of the charges against the defendant were dismissed on a motion to strike. A copy of the transcript from that proceeding was supplied previously, and the testimony of the police officers in that case demonstrate the problems with the ordinance and the way in which it is enforced.

11. On October 14, 2004, the Honorable Stephen C. Mahan presided over Commonwealth v. Joshua Erik Price, CR04-3117. A copy of the transcript from that proceeding was supplied previously. In this case involving music volume at another oceanfront area restaurant, the prosecution was utterly unable to articulate any type of objective standard or test. Judge Mahan dismissed the charge on a motion to strike.

12. On January 19, 2006, the Honorable Patricia L. West presided over Commonwealth v. Anthony Smith, CR05-4748. A copy of the transcript of that proceeding was supplied previously. In this case involving music at an establishment in the 2100 block of Atlantic Avenue, the prosecution was unable to present any evidence that articulated a clear standard or which would otherwise provide for "clear notice" to the public. Judge West received briefs on the constitutional issues, but, ultimately, declined to reach the constitutional questions and simply dismissed the charge on the basis of insufficient evidence.

13. On September 12, 2005, Andrew C. Edwards, an owner of "Chicho's" (a restaurant located at 2112 Atlantic Avenue) went before the General District Court for an alleged noise ordinance violation in case GC05-13176. Like the others, this case involved music volume. The charging officer failed to show up for court and the case was dismissed. A copy of the disposition from that case was supplied previously.

14. On July 9, 2007, Tanner was tried in Virginia Beach General District Court on two alleged noise violations in case nos. GC07-9605 and GC07-4711. The Honorable Calvin R. Depew, Jr. dismissed the charge in case no. GC07-9605, but convicted in case no. GC07-4711 (with the conviction appealed and currently pending in Virginia Beach Circuit Court). The transcript of those proceedings was filed previously and further demonstrates the confusion and unpredictability associated with noise ordinance enforcement and legal proceedings.

15. On August 28, 2007, The Honorable W. Edward Hudgins, Jr. presided over two noise ordinance cases. In GC07-10231, a charge was dismissed against Matthew Potter. A copy of the transcript of that case is attached hereto as Exhibit A. In GC07-9642, Judge Hudgins convicted Tanner (who has appealed to the Virginia Beach Circuit Court, with that case pending). A copy of the transcript of that case is attached hereto as Exhibit B. In both instances, the charging officers did not allege that any person complained or was disturbed by the music which led to issuance of a summons. In Tanner's case, Officer W. Ahern testified that the

standard used was whether he could "hear the noise clearly from one establishment from across the street." (TR 8). Notably, this testimony from Officer Ahern indicates that the standard he and his fellow officers have been using is the exact same standard that Judge Lowe advised was unacceptable in Commonwealth v. John Leonard Lewis, referenced in 1J10 herein above. In other words, in the aftermath of Judge Lowe's ruling in the Lewis case three years ago, the Virginia Beach Police Department appears to have institutionalized the precise enforcement methodology that a Virginia Beach Circuit Court judge advised was unacceptable and improper.

16. On September 5, 2007, Carlos Cooke (case no. GC07-8455) and Matthew Potter (case no. GC07-8551) were before the Virginia Beach General District Court on alleged violations of the noise ordinance. That morning, Kathy D. Rountree appeared on behalf of the city attorney's office and agreed that due to Officer D'Orio's anticipated testimony, the charges should be dismissed. A copy of the case printouts/are attached hereto as Exhibits C and D.

17. These case transcripts and dispositions highlight the problem that confronts citizens in general, and operators of oceanfront area restaurants in particular. The police are habitually and repeatedly bringing charges that often cannot be proved in court. This is being done at great expense, both financial and emotional, to the individuals charged with criminal violations, and in a manner which wastes judicial resources. In the instances

where judges have deemed the evidence to be sufficient for the finding of guilt, the reasoning has been vague and confusing, with no guidance provided to these defendants or anyone else to enable them to know how to determine the legality or illegality of their conduct on a "go-forward basis".

18. For years the City has known that its ordinance is defective, and yet it has made no changes. By contrast, numerous other localities have enacted ordinances which use decibel levels. The ability to measure sound levels has been in existence for decades, yet Virginia's largest city refuses to enact a modern, measurable ordinance. However, back in 1995, the City of Virginia Beach reached a "Noise Restrictions Agreement" with the operator of the Virginia Beach Amphitheater. A copy of that agreement was filed with the Court previously. This agreement demonstrates that the City knows how to measure sound.

19. Additionally, certain aspects of §23-47 constitute blanket prohibitions against certain types of sound or noise, including, but not limited to §23-47(a)(5). This type of blanket prohibition violates free speech, due process and equal protection rights guaranteed by the Virginia constitution.

20. Despite knowing how to measure sound and create an ordinance with objective standards, and despite losing a great number of cases in the courtroom where the City has attempted to enforce its standardless ordinance over a period spanning years, the City has steadfastly and stubbornly refused to enact any changes. Evidently, if there is to

be any meaningful change, it is going to have to start with a ruling from this court.

21. Plaintiffs are sustaining ongoing, irreparable harm, and their constitutional rights are being violated. Accordingly, declaratory and injunctive relief is required to remedy the situation.

WHEREFORE, for the foregoing reasons, your plaintiffs, Bradley S. Tanner, Eric Alexander Williams and BAE Ventures, Inc., t/a The Peppermint Beach Club, respectfully request that this Honorable Court declare that Virginia Beach Ordinance § 23-47 is violative of the Virginia Constitution, both facially and as applied, and is therefore void and unenforceable. Moreover, plaintiffs request that this Court enjoin the City of Virginia Beach, temporarily and permanently, from enforcing its noise ordinance (§ 23-47), and plaintiffs request such other and further relief as deemed appropriate under the circumstances, including, but not limited to, an award of attorneys' fees and costs.

BRADLEY S. TANNER,
ERIC ALEXANDER WILLIAMS,
BAE VENTURES, INC. t/a
THE PEPPERMINT BEACH CLUB

/s/_____
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CERTIFICATE

I hereby certify that a copy of the foregoing was sent via facsimile and first class mail this 6th day of September, 2007, to Christopher S. Boynton, Senior City Attorney, Office of the City Attorney, Municipal Center; Building 1, Room 260, 2401 Courthouse Drive, Virginia Beach, Virginia 23456.

/s/
Kevin E. Martingayle

[FILED JUNE 22, 2007]

VIRGINIA: IN THE CIRCUIT COURT OF
THE CITY OF VIRGINIA BEACH

BRADLEY S. TANNER,

ERIC ALEXANDER WILLIAMS

and

BAE VENTURES, INC., t/a
THE PEPPTERMINT BEACH CLUB,

Plaintiffs,

v. Case No. _____

THE CITY OF VIRGINIA BEACH

Defendant.

Serve: **Leslie L. Lilley,**
City Attorney
Office of the City Attorney
Municipal Center,
Building 1, Room 260
2401 Courthouse Drive
Virginia Beach,
Virginia 23456

COMPLAINT FOR DECLARATORY INJUNCTIVE RELIEF

NOW COME your plaintiffs, Bradley

S. Tanner (hereinafter "Tanner"), Eric Alexander Williams (hereinafter "Williams") and BAE Ventures, Inc. t/a The Peppermint Beach Club (hereinafter "The Peppermint"), after having been duly sworn, and in support of their complaint, state as follows:

1. Tanner is a resident of the City of Suffolk and Williams is a resident of the City of Virginia Beach.

2. The Peppermint is a Virginia corporation operating as a restaurant and entertainment venue located at 1801 Atlantic Avenue in the City of Virginia Beach.

3. The City of Virginia Beach (hereinafter "the City") is a municipal corporation created and in existence pursuant to applicable provisions of the Code of Virginia. Among other functions, the City operates a police department. Additionally, the City has created and passed into law certain ordinances, including one which is the subject of this complaint, § 23-47 (copy attached).

4. Tanner and Williams are owners and operators of The Peppermint. Over the past year or more, they have been charged, repeatedly, with violations of City ordinance § 23-47, always because of music volume. In addition to the times when they

have been issued summonses, they have also been threatened with arrest and detention in jail, even though the subject ordinance is a Class 4 misdemeanor punishable by nothing more than a fine. Obviously, this has been very unsettling, disturbing and upsetting to them, and it has significantly impaired their ability to conduct business at The Peppermint, and has damaged the ability of The Peppermint to conduct business and satisfy its customers. Enforcement of the ordinance has been stepped up significantly in the past month to the point of being intolerable.

5. On its face, the subject noise ordinance is legally defective and violates the Virginia Constitution because it is overly vague, contains no standards or criteria for enforcement, and fails to provide citizens with "fair notice" of what specific conduct is unlawful.

6. Moreover, as applied and enforced, the subject ordinance is unlawful and violates the Virginia Constitution because law enforcement officials in Virginia Beach exercise unfettered individual discretion in deciding whether to charge individuals with noise ordinance violations. Over the years, City police officers have testified in numerous attempts at prosecution of the ordinance that the decision to charge a violation of the ordinance is purely a matter of opinion, and

have further admitted that violations are often alleged without any underlying citizen complaints at all.

7. Special rules of statutory construction apply to penal statutes, which are strictly construed against the government and may not be extended by implication. *Stevenson v. City of Falls Church*, 243 Va. 434, 436 (1992). Lack of sufficient "definiteness" and "clear and unequivocal tests to ascertain guilt" will lead to penal statutes being invalidated. *Goldstein v. Commonwealth*, 200 Va. 25, 27-28 (1958) (obscenity statute struck down). If "a person could not receive fair notice of the relevant law by reading [the] penal ordinance", it is unenforceable. *Rollins v. Gordonsville*, 216 Va. 25, 26 (1975). "We have often held that a penal statute must be definite and certain to be valid, and it denies due process of law if it is vague or ambiguous." *Sharp v. Commonwealth*, 213 Va. 269, 271 (1972) (internal citations omitted). "The Constitution does not permit the legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who should be rightfully detained, and who should be set at large." *Chicago v. Morales*, 527 U.S. 41, 60 (1999) (internal citations omitted) (invalidating an anti-loitering ordinance). See also *Booth v. Commonwealth*, 197 Va. 177 (1955) (declaring the term "improper person" to be unconstitutionally vague and

indefinite in the context of an alcohol interdiction order); *Squire v. Pace*, 380 F. Supp. 269, (W.D. Va. 1974), affd. 516 F. 2d 240 (4th Cir. 1975), cert, denied 423 U.S. 840 (1975) (granting *habeas corpus* and striking down on both free speech and vagueness grounds a Virginia "disorderly conduct" statute). As these cases and others make perfectly clear, the requirement of certainty in penal statutes and ordinances is fundamental to American jurisprudence. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (vagrancy ordinance ruled void for vagueness); *Coleman v. City of Richmond*, 5 Va. App. 459 (1988) reh'g. denied, 6 Va. App. 296 (1988) (invalidating Richmond ordinance prohibiting loitering in a public place under circumstances manifesting the purpose of engaging in prostitution).

8. In the specific context of noise ordinances, cases from many jurisdictions around the United States constitute strong and persuasive authority in support of plaintiffs' arguments that the standardless Virginia Beach noise ordinance is invalid. See, *e.g.*, *U.S. Labor Party v. Pomerleau*, 557 F. 2d 410 (4th Cir. 1977); *Thelen v. State*, 526 S.E. 2d 60 (Ga. 2000); *Lionhart v. Foster*, 100 F. Supp. 2d 383 (E.D. La.1999); *Dupres v. City of Newport. R.I.*, 978 F. Supp. 429 (D. R.I. 1997); *Nichols v. City of Gulfport*, 589 So. 2d 1280 (Miss. 1991); *Dae Woo Kirn v. City of New York*, 774 F. Supp.

164 (S.D. N.Y.1991); *People v. New York Trap Rock Corp.*, 57 N.Y. 2d 371, 456 N.Y.S. 2d 711 (N.Y. 1982). Copies of these cases are attached hereto. In each of these cases, the subject noise ordinance was at least as specific as the Virginia Beach noise ordinance, and in some cases much more specific, and yet in each instance, the ordinance failed to pass muster and was deemed to violate constitutional rights.

9. This court has been the site of a great deal of prior litigation involving the Virginia Beach noise ordinance. The subject dispute involves music emanating from a restaurant located at 1801 Atlantic Avenue. Notably, the restaurant is on the ground floor of a hotel, and the owners/operators of The Peppermint have had no citizen or hotel complaints concerning the music volume at the restaurant. Nevertheless, the police continue to allege violations and threaten arrest.

10. In 2003, other individuals associated with the predecessor restaurant at this same location mounted a challenged to the subject ordinance in Feenev. et. al. v. City of Virginia Beach, CH03-3636. The case proceeded before the Honorable Frederick B. Lowe on the initial question of whether the ordinance is facially defective. Judge Lowe found that it was not, but left for future determination the issue of whether it was being applied selectively and

unconstitutionally. However, before any further determinations could be made, the case was non-suited because the City and Virginia Department of Alcoholic Beverage Control effectively drove the restaurant out of business. However, less than one month after Judge Lowe entered an order in Feeney, he presided over Commonwealth v. John Leonard Lewis, CR03-2866-00, CR03-2996-00 CR03-2996-01; CR03-4413-00 and CR03-4751 (5 charges/incidents consolidated for trial). The case involved music volume at a restaurant located diagonally across the street from where The Peppermint is now, and it was tried on July 15, 2004. All of the charges against the defendant were dismissed on a motion to strike. A copy of the transcript is attached hereto as Exhibit "A", and the testimony of the police officers in that case demonstrate the problems in the ordinance and the way in which it is enforced.

11. On October 14, 2004, the Honorable Stephen C. Mahan presided over Commonwealth v. Joshua Erik Price, CR04-3117. A copy of the transcript is attached hereto as Exhibit "B". In this case involving music volume at another oceanfront area restaurant, the prosecution was utterly unable to articulate any type of objective standard or test. Judge Mahan dismissed the charge on a motion to strike.

12. On January 19, 2006, the

Honorable Patricia L. West presided over Commonwealth v. Anthony Smith, CR05-4748. A copy of the transcript is attached hereto as Exhibit "C" In this case involving music at an establishment in the 2100 block of Atlantic Avenue, the prosecution was unable to present any evidence that articulated a clear standard or which would otherwise provide for "clear notice" to the public. Judge West received briefs on the constitutional issues, but, ultimately, declined to reach the constitutional questions and simply dismissed the charge on the basis of insufficient evidence.

13. On September 12, 2005, Andrew C. Edwards, an owner of Chicho's (a restaurant located at 2112 Atlantic Avenue) went before the General District Court for an alleged noise ordinance, violation in case GC05-13176. Like the others, this case involved music volume. The charging officer failed to show up for court and the case was dismissed. A copy of the disposition is attached hereto as Exhibit "D".

14. These case transcripts and dispositions highlight the problem that confronts citizens in general, and operators of oceanfront area restaurants in particular. The police are habitually and repeatedly bringing charges that cannot be proved in court. This is being done at great expense, both financial and emotional, to the

defendants, and in a manner which wastes judicial resources.

15. For years the City has known that its ordinance is defective, and yet it has made no changes. By contrast, other localities have enacted ordinances which use decibel levels. The ability to measure sound levels has been in existence for decades yet Virginia's largest city refuses to enact a modern, measurable ordinance. However, back in 1995, the City of Virginia Beach reached a "Noise Restrictions Agreement" with the operator of the Virginia Beach Amphitheater. A copy of that agreement, which includes decibel levels, is attached hereto as Exhibit "E". This demonstrates that the City knows how to measure sound.

16. Despite knowing how to measure sound and create an ordinance with objective standards, and despite losing case after case in the courtroom where the City has attempted to enforce its standardless ordinance over a period spanning years, the City has steadfastly and stubbornly refused to enact any changes. Evidently, if there is to be any meaningful change, it is going to have to start with a ruling from this court.

17. Plaintiffs are sustaining ongoing, irreparable harm, and their constitutional rights are being violated.

Accordingly, declaratory and injunctive relief is required to remedy the situation.

WHEREFORE, for the foregoing reasons, your plaintiffs, Bradley S. Tanner, Eric Alexander Williams and BAE Ventures, Inc., t/a The Peppermint Beach Club, respectfully request that this Honorable Court declare that Virginia Beach Ordinance §23-47 is violative of the Virginia Constitution, both facially and as applied, and is therefore void and unenforceable. Moreover, plaintiffs request that this Court enjoin the City of Virginia Beach, temporarily and permanently, from enforcing its noise ordinance (§23-47), and plaintiffs request such other and further relief as deemed appropriate under the circumstances, including, but not limited to, an award of attorneys' fees and costs.

BRADLEY S. TANNER
ERIC ALEXANDER WILLIAMS and
BAE VENTURES, INC. t/a
THE PEPPERMINT BEACH CLUB

By /s/ _____
Kevin E. Martingayle, of counsel

/s/ _____
Bradley S. Tanner

/s/ _____
Eric Alexander Williams
BAE Ventures, Inc. t/a

The Peppermint Beach Club

By /s/ _____
It's duly authorized agent

STATE OF VIRGINIA,

CITY OF VIRGINIA BEACH,

Subscribed and sworn to before me this 22nd day of June, 2007, by Bradley S. Tanner, Eric Alexander Williams and Bradley S. Tanner, duly authorized agent for BAE Ventures, Inc., t/a The Peppermint Beach Club.

/s/ _____
Notary Public

My commission expires: 9-30-09 .

Kevin E. Martingayle, Esquire
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OFFICIAL SEAL
NANCY F. WHITFIELD
NOTARY PUBLIC
COMMONWEALTH OF VIRGINIA
Comm. Expires: September 30, 2009

[UNDATED]

Sec. 23-47. Loud, disturbing and unnecessary noise.

(a) It shall be unlawful for any person to create, or allow to be created any unreasonably loud, disturbing and unnecessary noise in the city or any noise of such character, intensity and duration as to be detrimental to the life or health of persons of reasonable sensitivity or to disturb or annoy the quiet, comfort or repose of reasonable persons. The following acts, among others, are declared to be loud, disturbing and unnecessary noise in violation of this section, but such enumeration shall not be deemed to be exclusive:

(1) The playing of any television set, radio, tape player, phonograph or any musical instrument in such a manner or with such volume as to annoy or disturb the quiet, comfort or repose of reasonable persons.

(2) The keeping of any animal which, by causing frequent or long-continued noise, shall disturb the quiet, comfort or repose of the neighborhood to such an extent as to constitute a nuisance.*

***Cross references:** Barking dogs, § 5-10.

(3) The creation of an excessive noise on any street adjacent to any school, institution

of learning or court, while the same is in session, or adjacent to any building used as a place of public worship, while being so used or adjacent to any hospital, which unreasonably interferes with the workings of such school, institution or court or the services being conducted in such place of public worship or which disturbs or unduly annoys patients in such hospital.

(4) The shouting or crying of peddlers, hawkers and vendors which disturbs the peach and quiet of the neighborhood.

(5) The use of any drum, loudspeaker or other instrument or device for the purpose of attracting attention, by creation of noise, to any performance, show or sale or display of merchandise.

(b) Any person who violates the provisions of this section shall be guilty of a class 4 misdemeanor.

(Code 1965, § 23-32; Ord. No. 1326, 9-13-82; Ord No. 1563, 10-28-85; Ord. No. 1827, 2-6-89)

Cross references: Muffling devices for motor boats, § 6-109; noise created by persons aboard boat or other water craft, § 6-110; use of bells by street vendors to attract customers, § 13-54; reduction of noise from vehicle load, § 21-211; unreasonable noise from operation of motorcycles, § 21-444; unnecessary noise by commercial solicitors, § 26-17; portions of streets as quiet zones, § 33-17.

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(2)

Supreme Court, U.S.
FILED
DEC 9 2009
OFFICE OF THE CLERK

No. 09-314

In the Supreme Court of the United States

CITY OF VIRGINIA BEACH, VIRGINIA,

Petitioner,

v.

BRADLEY S. TANNER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Virginia Supreme Court correctly applied this Court's settled precedents in holding unconstitutional a provision of petitioner's (since-amended) municipal noise ordinance?

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

PROVISIONS INVOLVED

In addition to those cited in the petition, this case involves Article I, Sections 11 and 12 of the Virginia Constitution and the First Amendment to the United States Constitution. The text of each is set out in the Appendix.

Additionally, after the decision below, the City of Virginia Beach amended the relevant chapter of its City Code. Among the sections added is one that provides:

> No person shall permit, operate or cause any source of sound to create a sound level emanating from a restaurant during the hours between 11:00 p.m. and 7:00 a.m. (1) in excess of seventy-five (75) dB(A) when measured from any public area, including but not limited to adjacent streets or sidewalks; or (2) that is plainly audible and discernable at a distance of fifty (50) feet from any of the restaurant's external walls when measured from any property other than the property on which the restaurant is located.

Virginia Beach City Code § 23-72 (Adopted May 12, 2009).

STATEMENT

Petitioner, the City of Virginia Beach, Virginia, seeks review of the Virginia Supreme Court's unanimous decision holding unconstitutional a provision of the city's since-amended municipal noise control ordinance.

1. Virginia Beach City Code § 23-47 makes it a misdemeanor offense to "create or allow to be created" any "unreasonably loud, disturbing and unnecessary noise in the city * * *." The provision does not further define these operative terms; and though it identifies five "acts * * * declare[d]" to be "loud, disturbing and unnecessary noise in violation of this section," *ibid.*, it also announces that this enumeration does not exhaust its reach, *ibid.* See Pet. 4-5 (reproducing full ordinance).

By the ordinance's terms, this single standard governs at all times, in all parts of the city, and applies to all kinds of activity, including musical performances and commercial speech, see City Code § 23-47(5) (forbidding use of noise to "attract[] attention * * * to any * * * sale or display of merchandise"), as well as other noise-generating conduct.

2. Although the ordinance includes prohibitions keyed to incursions on "the comfort, quiet, or repose of reasonable persons" and "persons of reasonable

sensitivity," its language indicates these to be alternatives to – not limitations on – the encompassing general standard: It is unlawful to make "any unreasonably loud, disturbing and unnecessary noise in the city *or* any noise of such character, intensity and duration * * * to disturb or annoy the quiet, comfort or repose of reasonable persons," City Code § 23-47 (emphasis added). And even these standards do not limit the law's reach to activities that have precipitated *actual* complaints of disturbance.

3. Consistent with its broad language, the provision has been understood to authorize prosecution where an individual police officer determines that the noise from a particular activity is "unreasonably loud" or that it *would* "annoy the repose" of a – hypothetical – "reasonable person," even if no complaint was received.

In the months preceding the instant action, municipal police repeatedly cited respondents, who operated the Peppermint Beach Club, an entertainment venue located on the ground floor of a hotel in the city's commercial "oceanfront" section, Pet. App. 1a, despite the fact that the business had never generated a noise complaint, either to police authorities or to hotel management. *Id.* at 21a. At the same time, however, neighboring entertainment venues, which had generated large numbers of citizen noise complaints, were never cited. *Ibid.*

4. City officials were long aware of the problems of unpredictability and inconsistent enforcement the provision engendered. Before this suit, numerous enforcement actions had been dismissed by trial judges – although only after respondents and other defendants had been cited, prosecuted, and incurred substantial defense costs. See Pet. App. 52a-56a (Complaint ¶¶ 9-17).

5. In 2007, an official in the city's police department had taken it upon himself to formulate and publicize an alternative enforcement standard, under which citations could be issued when sound "definitively linked" to a particular establishment in the area was "plainly" audible "across the street." Pet. App. 5a.

This development generated still further uncertainty, raising questions about the new rule's geographic and substantive reach; the official's authority to formulate such rules; its relationship to the existing, codified language of the provision; and its constitutionality. These questions generated a variety of answers among individual police officers and courts adjudicating enforcement actions. See Pet. App. 21a.

6. In June 2007, respondents initiated this suit in state court, seeking, *inter alia*, a declaratory judgment that "Virginia Beach § 23-47 is violative of the Virginia Constitution, both facially and as

applied." Pet. App. 57a. The complaint referenced respondents' experience, as well as numerous trial court proceedings involving other parties, which highlighted the ordinance's uncertain reach and unpredictable enforcement. See *id.* at 52a-55a.

7. The trial court dismissed respondents' facial challenge without extensive analysis, citing another trial judge's 2003 disposition of a similar claim. Pet. App. 29a. The court heard evidence on their other claims, including testimony of city police officers, who (in the Virginia Supreme Court's words) "generally conceded" that the ordinance embodies a "standard that depends on an individual officer's assessment." Pet. App. 5a. The trial court specifically found that "Virginia Beach police officers possess wide discretion in determining whether music violates the ordinance"; that "the ordinance is not enforced the same throughout the city"; and that enforcement was "relaxed and possibly abandoned, in regards to outdoor entertainment," Pet. App. 21a. It found that even as respondents were repeatedly charged in the absence of any "specific complaints from citizens," no actions were brought against others, despite one witness's testimony "that he complained to the city over one-hundred times about outdoor music levels," *Ibid.* The court further found that the "across the street" standard had failed to cure the problems of unpredictable and subjective enforcement. *Ibid.*

Despite these findings and its conclusions that (1) respondents had "succeed[ed] in demonstrating that other persons similarly situated were not prosecuted," Pet. App. 22a, and (2) the record "unequivocally establishe[d] that the enforcement of the noise ordinance is selective and uneven," *id.* at 21a, the court declined to hold the ordinance unconstitutional, explaining that respondents had not proved "a discriminatory purpose." *id.* at 22a (citation and internal quotation marks omitted).

8. Respondents appealed to the Supreme Court of Virginia, which, in a unanimous decision, reversed, concluding that the ordinance was unconstitutionally vague.

The court explained that the "constitutional prohibition against vagueness * * * protects citizens from the arbitrary and discriminatory enforcement of laws," Pet. App. 8a, and that special concerns are implicated "when a vague statute implicates citizens' rights under the First Amendment," Pet. App. 9a.

The court also expressed its strong general reluctance to hold statutes unconstitutional, see Pet. App. 7a, and acknowledged that, given that legislators are "'[c]ondemned to the use of words,' courts cannot require 'mathematical certainty' in the drafting of legislation," *id.* at 8a (quoting *Grayned* v. *City of Rockford*, 408 U.S. 104, 110 (1972)).

Addressing the city's noise control ordinance, the court concluded that its "provisions do not contain ascertainable standards," and "fail to give 'fair notice' to citizens." Pet. App. 9a. The "reach of [the ordinance's] general descriptive terms" the court explained, "depends in each case on the subjective tolerances, perceptions, and sensibilities of the listener" – *i.e.*, the police officer. Pet. App. 10a. The court further explained that the references to "reasonable persons" and "persons of reasonable sensitivity" did not cure these problems, because "considered in their context," these terms continued to "delegate to a police officer the subjective determination * * * whether persons the police officer considers to be reasonable would be disturbed or annoyed." *Ibid.* This delegation "invite[s] arbitrary enforcement," the court continued, because individual officers invariably will "have differing perceptions regarding what levels of sound" are unreasonable or impermissible. *Ibid.*

Because the Virginia Supreme Court held the ordinance invalid on its face, it did not reach respondents' alternative claims that it also violated the Virginia Constitution, as applied. Pet. App. 12a.[1]

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[1] Neither in the court below nor in this one has petitioner sought to overturn the trial court's findings, which include "that the enforcement of the noise ordinance is selective and uneven," that respondents had been treated differently from others "similarly situated," Pet. App. 21a, and that no citizen noise complaint against them had been identified, *ibid.*

9. Petitioner did not ask the Virginia Supreme Court to stay its decision; nor did it undertake to redraft the provision the court had held unconstitutional. The city instead enacted an entirely new noise control ordinance, which it codified alongside the one held invalid.

The new law, modeled on measures in effect in a number of other Virginia municipalities, prescribes separate standards (stated largely in decibel levels) for daytime and nighttime noise, see City Code § 23-69(a),(b); for noise heard in multifamily dwellings, *id.* § 23-69(c); for motor vehicle noise (including separate standards for motorcycles and cars and for zones where the speed limit is above or below 35 miles per hour), *id.* § 23-70; for activities in "noise-sensitive areas," *id.* § 23-71(e); and sound generated by particular construction equipment, *id.* § 23-71(f). Particularly relevant here, the new ordinance provides:

> No person shall permit, operate or cause any source of sound to create a sound level emanating from a restaurant during the hours between 11:00 p.m. and 7:00 a.m. (1) in excess of seventy-five (75) dB(A) [decibels] when measured from any public area, including but not limited to adjacent streets or sidewalks; or (2) that is plainly audible and discernable at a distance of fifty (50) feet from any of the restaurant's external walls when measured

> from any property other than the property on which the restaurant is located.

Id. § 23-72; see also *id.* § 23-64 (defining "restaurant" to include, *inter alia*, "bars [and] lounges"); *id.* § 23-68 ("In order to implement and enforce this article effectively, the chief of police shall promulgate standards and procedures for using and testing sound level meters used in the enforcement of this article.").

REASONS FOR DENYING THE WRIT

The decision below does not warrant review by this Court. In holding the local ordinance unconstitutionally vague, the Virginia Supreme Court correctly applied settled constitutional principles to the circumstances of the particular ordinance before it. The court did not, as petitioner claims, announce a broad rule that particular words or phrases are constitutionally deficient per se. Rather, as have this Court's decisions both sustaining and invalidating laws on vagueness grounds, the court carefully considered the language, structure, context, and administrative construction of petitioner's ordinance.

Petitioner's attempt to depict a "conflict" among lower courts suffers from the same basic defect: The different outcomes in the cases petitioner collects are the natural result of consistent application of the context-sensitive constitutional standard. Like the

Virginia Supreme Court's decision below, those cases do not rest on a controversial or disputed understanding of any important, generally applicable principle of constitutional law.

But even if there were any genuine reason for the Court to revisit the issue of the constitutional standards applicable to municipal noise ordinances, this case would be an exceedingly poor one in which to do so. The ordinance at issue is highly unusual, both in authorizing enforcement in the absence of any actual complaint and in operating simultaneously with a second, competing standard not mentioned in the city's code. And it has been the subject of specific and unchallenged factual findings of arbitrary and selective enforcement (giving rise to additional constitutional claims that were presented to, but not decided by, the court below). What is more, petitioner's enactment, during the pendency of this litigation, of a new and comprehensive ordinance addressing the same subject matter would give rise to further questions of state and federal law that this Court would be ill-positioned to resolve in the first instance.

I. The Virginia Supreme Court Correctly Applied Settled Principles of Constitutional Law To The Particular Ordinance Before It

The decision below does not raise any important or unsettled question of constitutional law. In

holding petitioner's ordinance unconstitutional, the unanimous Virginia Supreme Court applied the well-settled test for unconstitutional vagueness – the very same standard cited in the petition and applied in the decisions petitioner insists are in "conflict."

The court below correctly identified the purpose of the vagueness doctrine: to assure that laws define offenses with sufficient clarity to provide fair notice and limit arbitrary police enforcement. See *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983); see also *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (Opinion of Stevens, J.) (describing lack of fair notice and susceptibility to arbitrary enforcement as "two independent reasons" for invalidation). The court properly recognized that clarity is especially important when a law "implicates citizens' rights under the First Amendment." Pet. App. 9a; see *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Ward* v. *Rock Against Racism*, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment."). Further, the court noted that "context" is critical in determining vagueness claims, as is the administrative construction a law has been given. See *Grayned*, 408 U.S. at 110; cf. *Deegan* v. *City of Ithaca*, 444 F.3d 135, 146 (2d Cir. 2006) (noting that an "unpredictable construction and application of [an] ordinance," can "deprive[] [a citizen] of his right to understand what conduct violate[s] a law").

Consistently with this Court's precedents, the decision expressly acknowledged that, in view of the inherent imprecision of language, neither "'mathematical certainty'" nor "meticulous specificity" is required to withstand constitutional scrutiny. Pet. App. 8a (quoting *Grayned*, 408 U.S. at 110). Rather, the Constitution requires only that "the ordinance as a whole makes clear what is prohibited." *Ibid.*

Petitioner largely seeks to overturn the Virginia Supreme Court's application of these established principles of law to the particular case before it. Such claims seldom warrant exercise of this Court's discretionary jurisdiction, see, *e.g.*, *Powell* v. *Nevada*, 511 U.S. 79, 87-88 (1994) (Thomas, J., dissenting), especially where, as here, the case arises from a state supreme court's construction of its own law. See *Morales*, 527 U.S. at 61 (this Court has "no power to construe the language of a state statute more narrowly than the construction given by that state's highest court"); accord *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 838 & n.9 (1978).

In any event, however, the Virginia Supreme Court correctly applied the law to the facts of the case. The court recognized that the challenged ordinance, as written and construed, both fails to give adequate notice and authorizes arbitrary enforcement. The law, by its terms, subjects a vast range of disparate activity, carried out at different

times and in different types of areas, to a single, vaguely-worded standard, which it does not further define. And the ordinance empowers individual officers to issue citations whenever they believe sound "*would*" have an unwelcome effect on a (hypothesized) "reasonable person" – irrespective of any actual complaints. See Pet. App. 10a (emphasis added). Such a standard is inherently "subjective," *id.* at 11a, effectively "entrust[ing] lawmaking 'to the moment-to-moment judgment of the policeman on his beat,'" *Kolender*, 461 U.S. at 360 (quoting *Smith* v. *Goguen*, 415 U.S. 566, 575 (1975)); cf. *Saia* v. *New York*, 334 U.S. 558, 560-561 (1948) (striking down police permission requirement on ground that it placed "'[t]he right to be heard * * * in the uncontrolled discretion of the Chief of Police").

As the court also properly recognized, these constitutional problems were aggravated by petitioner's employment of "two enforcement standards in evaluating noise emanating from oceanfront business establishments." Pet. App. 4a. A person endeavoring to understand the general language of § 23-47 would be surprised to learn that every sound that was "audible from across the street" was "unreasonably loud," let alone that this distinct, stringent standard would apply only in a commercial district, not a residential one, and even within the commercial area, would not be applied uniformly. Indeed, as the Second Circuit held, in strikingly similar circumstances involving a generally-worded

noise ordinance that had been given an "unpredictable construction" by local officials, such overlapping and incompatible standards can deprive citizens of proper notice. See *Deegan*, 444 F.3d at 146.

And "actual experience with the ordinance," *Reeves* v. *McConn* 631 F.2d 377, 386 (5th Cir. 1980), has shown that concerns regarding the vagueness – not to mention vagaries – of this regime were well-founded. The Virginia Beach Circuit Court found that "the evidence 'unequivocally establishe[d] that the enforcement of the noise ordinance is selective and uneven,'" Pet. App. 21a, with others "similarly situated," *id.* at 22a, to respondents being treated entirely differently.[2]

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[2] Although the decision invalidated petitioner's ordinance on vagueness grounds alone, without reaching respondents' other constitutional claims, these findings would raise further, insuperable barriers to upholding the ordinance. Even outside the First Amendment context, this Court has held that the Constitution forbids government from "intentionally treat[ing individuals] differently from others similarly situated" without "rational basis." *Village of Willowbrook* v. *Olech*, 528 U.S. 562, 564 (2000). In First Amendment cases, the Court has been especially reluctant to uphold restrictions when the otherwise legitimate governmental interests asserted are pursued erratically. See, *e.g.*, *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 418 (1993) (noting that newsracks removed under challenged policy were "no more harmful," from an esthetic and safety perspective than those permitted to remain); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 488-489 (1995).

Petitioner's claim of "jurisprudentially significan[t]" error, Pet. 2, rests on a misreading of both the Virginia Supreme Court's decision and this Court's governing precedents. The decision below did not purport to require any particular approach to noise control. But see Pet. 2 (asserting that court held a statute "must contain mathematically precise standards such as decibel ranges"); *id.* at 11 (similar). Nor did it hold any word or phrase unconstitutionally vague *per se* in every (or any other) statutory setting. But see Pet. 12 (accusing that court of "reject[ing] * * * the 'reasonable person' standard"). On the contrary, it held this particular ordinance "as a whole" failed to meet the constitutional minimum standard, giving due weight to context, administrative construction, and principles of restraint counseling against unnecessary invalidation. See Pet. App. 7a-8a.

That approach is not a departure from this Court's jurisprudence, but a faithful restatement of it. This Court's cases do not purport to pronounce words vague (or definite) in isolation, but instead highlight the importance of context – both semantic and substantive. See *United States* v. *Williams*, 128 S. Ct. 1830, 1846 (2008) (explaining that vagueness precedents have invalidated laws that "tied criminal culpability" to conduct described with reference to "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings"); *FDA* v. *Brown & Williamson Tobacco*

Corp., 529 U.S. 120, 132 (2000) ("[T]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context."). As the Court emphasized in *Hoffman Estates*, vagueness standards "should not * * * be mechanically applied." Rather, "the degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depend * * * on the nature of the enactment," with "more stringent vagueness test[s]" applying to laws that affect First Amendment rights and authorize criminal penalties. 455 U.S. at 498-499 (footnotes omitted); see also *Kolender*, 461 U.S. at 357-358 (identifying "the requirement that a legislature establish minimal guidelines to govern law enforcement" as "the more important aspect of vagueness doctrine").

Thus, *Grayned* emphasized the narrowly limited reach of the ordinance upheld, underscoring that it was not "a vague, general 'breach of the peace' ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of school," 408 U.S. at 112. Moreover, the measure sustained contained a demanding *scienter* requirement, which limited prosecution to those "'*willfully* mak[ing]'" disruptive noise around public schools, *id.* at 113-114 n.24 (quoting jury verdict). Here, in contrast, the operative terms of the prohibition are "vague [and] general"; it applies to all

sound in every part of the city; it may be enforced (and is) without any showing of "impact" on school (or any other) activity, let alone an "easily measured" one; and its violation does not depend on any showing of *scienter*.

Nor do any of the other decisions petitioner points to "stand in stark contrast," Pet. 12, to the one here. Like the one below, this Court's decision in *Coates* v. *Cincinnati*, 402 U.S. 611, 613 (1971) (Pet. 12) *invalidated* a statute on vagueness grounds, and *Cameron* v. *Johnson*, 390 U.S. 611 (1968), upheld a measure that was carefully circumscribed: Although the Court in that case turned aside a vagueness challenge keyed to the word "reasonably," it did so because the challenged law was "'precise and narrowly drawn'" and "'evince[ed] a legislative judgment that certain specific conduct'" – "'picketing * * * in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any * * * county * * * courthouses'" – should be proscribed. In that narrow context, the Court explained, "juxtaposed with 'obstruct' and 'interfere,'" the word "unreasonably" did not raise substantial vagueness concerns. See 390 U.S. at 617-618 (quoting *Edwards* v. *South Carolina*, 372 U.S. 229, 236 (1967), and ordinance). Nor did "*the Court* in *Kovacs* [v. *Cooper*, 336 U.S. 77, 78 (1949)] address[] whether the terms 'raucous' and 'loud' were so vague as to be unenforceable," Pet. 15 (emphasis added). Rather, in that splintered decision (which antedates

the development of much of this Court's modern First Amendment and vagueness jurisprudence), only three Justices addressed the permissibility of a prohibition on "loud and raucous" sound trucks. A majority of the Court understood "the issue presented" in that case to be quite different: "whether a state * * * may forbid all use of sound trucks * * * in public streets, [*i.e.*,] without reference to whether 'loud and raucous noises' are emitted," 336 U.S. at 105 (Rutledge, J., dissenting).[3]

Nor is there merit to petitioner's claims that this Court's cases hold that inclusion of the word "reasonable" establishes a law's validity per se – or, more fancifully, that the Virginia Supreme Court's invalidation of this ordinance somehow "conflicts with" Fourth Amendment or qualified immunity jurisprudence. See Pet. 12-14. The former contention is refuted by the decision in *Kolender*, which voided for vagueness a law that required an individual to provide "credible and reliable" identification to a

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[3] Even on its own terms, petitioner's argument misses the point: Justice Reed's opinion did not conclude that any particular "*term*[]" could be "enforce[d]" in every law in which it appeared, see Pet. 15 (emphasis added) – only that a law prohibiting sound trucks from making "loud and raucous" noise when driving through residential neighborhoods was sufficiently definite to pass constitutional muster. Even were it the holding of the Court, that would not settle that every ordinance including the phrase "unreasonably loud" is immune from challenge – especially one with the distinctive, problematic features identified by the court below.

police officer when requested – notwithstanding that that phrase had been interpreted to mean "carrying *reasonable* assurance [of] * * * authentic[ity]." See 461 U.S. at 361 (emphasis added); cf. *Morales*, 527 U.S. at 62 (acknowledging that the "requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on [his] authority," but holding that standard insufficient, in context).

The Virginia Supreme Court had no difficulty appreciating the error of petitioner's more far-flung analogies. Although it operates in the "criminal law setting[]," Pet. 14, the Fourth Amendment's requirement that searches and seizures be "reasonable" is a limitation on government, not a standard for imposing individual liability, and the qualified immunity standard does not determine criminal liability, see 18 U.S.C. § 242; *Hoffman*, 455 U.S. at 498-499. In that setting, "reasonable[ness]" affords added protection – in the form of an immunity from trial, see *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) – to individuals whose conduct *violates the Constitution*. Respondents here, in contrast, were engaged in constitutionally *protected* activity and were required repeatedly to endure trials before being vindicated. Cf. *Saia*, 334 U.S. at 560-561 (invalidating permission requirement, for placing police officer "athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal");

City of Lakewood v. *Plain Dealer Pub. Co*, 486 U.S. 750, 757 (1988) (noting that "the mere existence of the licensor's unfettered discretion" may induce self-censorship).

Of course, the Virginia Supreme Court did not hold or even intimate that terms like "unreasonable" and "reasonable person" are inherently vague or constitutionally irrelevant. It held merely that, in the particular context presented, those terms were insufficient.

II. There Is No Conflict Among The Lower Courts

The decision of the Virginia Supreme Court does not signal any conflict, "dangerous," Pet. 18 or otherwise, among lower courts. No other decision has sustained (or invalidated) this ordinance, of which the Virginia Supreme Court is the authoritative expositor. While petitioner labors to collect (and quote at length) seemingly every appellate case in which a noise regulation has been sustained against vagueness challenge – especially those which include some form of the word "reasonable" – its claim of "conflict" depends on disregarding multiple, constitutionally critical differences. Most important, none of the cases on petitioner's roll call either upheld a law a state court had authoritatively construed to impose a subjective standard or gave any indication that it would so hold. See Pet. App. 11a ("[the] determinations required by [petitioner's] ordinance

can only be made by police officers on a subjective basis"). Nor does the Virginia Supreme Court's decision suggest that another ordinance, embodying a more genuinely objective standard, would be unconstitutional. And in none of the lower court cases cited in the petition did the proponent of the ordinance adopt a dueling, second standard.

There is no conflict between the decision here and those of the Second or Fifth Circuits, which are the only federal appellate courts the petition cites, see Pet. 18-20. *Reeves* v. *McConn* 631 F.2d 377 (5th Cir. 1980), decided nearly three decades ago, actually held *un*constitutional the central provision of the law at issue. See *id.* at 388. Although, as the petition notes, that decision declined to hold invalid a provision prohibiting noise "disturbing * * * to persons within the area of audibility," the Fifth Circuit's rationale is worth recording: "If *actual experience* with the ordinance were to demonstrate that it represents a subjective standard * * * we would not hesitate to change our judgment." *Id.* at 386 (emphasis added). Here, of course, not only is there "unequivocal," evidence, Pet. App. 21a, of exactly such "experience" but there is also a definitive conclusion, by the court with final authority on the matter, that petitioner's ordinance depends on a subjective standard.

Nor is there any conflict between the Virginia Supreme Court and the Second Circuit. As explained above, this case if litigated in that jurisdiction would

have been controlled by *Deegan*, in which the Second Circuit sustained a vagueness claim precisely because, as here, the noise ordinance was being enforced according to a police-formulated standard neither suggested nor authorized by the generally-worded local statute. 444 F.3d at 145-146. Nor does the decision petitioner does cite, *Howard Opera House Assocs.* v. *Urban Outfitters, Inc.*, 322 F.3d 125 (2d Cir. 2003), conflict either. In *Howard*, there was no claim that the law at issue was being enforced – or lawfully could be – in the absence of actual disturbance or complaint. On the contrary, the terms of the ordinance required "disturb[ance] of the peace or health of another," and the case arose out of multiple complaints by a law firm concerning loud music emanating from a store located in the same office building. See 322 F.3d at 128. If anything, these two rulings highlight the degree to which cases of this kind are – properly – determined by the particulars of the ordinances and the circumstances surrounding their enforcement.

Petitioner's claim of conflict with state cases (Pet. 20-27) fares no better. To the extent the petition relies on decisions of intermediate courts, this Court generally does not sit to resolve such "conflicts," see Sup. Ct. R. 10; E. Gressman, *et al., Supreme Court Practice* (9th ed. 2007) at 225.[4] And the absence of

[4] See *id.* (citing *Earley v. State*, 789 P.2d 374 (Alaska Ct. App. 1990); *Harlem Yacht Club* v. *New York City Env'l Control Bd.*, 40 A.D.3d 331 (N.Y. App. Div. 2007); *Lutz* v. *City of*

subsequent decisions from the high courts of these States belies any claim that there is a pressing conflict warranting this Court's attention.

As for state high court decisions, a number of the cases featuring prominently in petitioner's catalogue of ostensibly "similar" cases involved measures that included a specific intent limitation, which is entirely lacking here. See, *e.g.*, *Eanes* v. *State*, 569 A.2d 604, 607 (Md. 1990) ("willfully"); *City of Beaufort* v. *Baker*, 432 S.E.2d 470, 472 (S.C. 1993) ("willfully"); *Earley*, 789 P.2d at 375 (requiring "intent" or "reckless disregard"); *State* v. *Johnson*, 542 P.2d 808, 809 (Ariz. 1975) ("maliciously and willfully"). And others involved laws with detailed standards and narrowly drawn, context-specific prohibitions, which would significantly check enforcement discretion. See, *e.g.*, *Town of Baldwin* v. *Carter*, 294 A.2d 62, 65 (Me. 2002) (animal noise ordinance that specified the type of "significant and ongoing" dog noise prohibited); see also *Indiana-Kentucky Elec.* v. *Comm'r Ind. Dept. Env'l Aff.*, 820 N.E.2d 771 (Ind. App. 2005) (upholding portions of noise ordinance that included specific and detailed standards).

Indianapolis, 820 N.E.2d 766 (Ind. Ct. App. 2005); *People* v. *Lord*, 796 N.Y.S.2d 511 (N.Y. App. Div. 2005); *State* v. *Friedman*, 697 A.2d 947 (N.J. Super. Ct. App. Div. 1997); and *Township of Plymouth* v. *Hancock*, 600 N.W.2d 380 (Mich. Ct. App. 1999)).

The few cases that actually address a "reasonable person" standard employ that standard in a fundamentally different way than did petitioner here – to provide additional protection when there is *already* another person (usually many persons) disturbed by the defendant's activity. For example, in *Eanes* (cited Pet. 21), the Maryland Court of Appeals upheld a noise ordinance (which included a "willful[ness]" requirement, see *supra*) enforced against an anti-abortion protestor whose loud speech had resulted in "numerous" complaints, expressly because the protestor's noise was "actually disruptive to the 'captive' audience in the neighborhood." 569 A.2d at 617. Similarly *Baker*, which also included a "willful" limitation, 432 S.E.2d at 472, upheld an ordinance applied to sound so loud that nearby merchants had been rendered "unable to conduct business," *id.* at 473. In these situations, the "reasonable person" standard acts to shield a potential defendant from the complaints of a "hypersensitive listener." The power claimed here is fundamentally different: A police officer is authorized to issue citations without any actual disturbance or third party complaint, based on his belief that a *hypothetical* reasonable person "would be" annoyed.

There is *no* objective external indicator here, such as proximity to a hospital, school, or residential neighborhood that would tell a reasonable person when he was at risk of prosecution for "unreasonably loud * * * and unnecessary" sounds. Indeed, the only

such indicators available – that no member of the public (including hotel guests) in fact complained about sound from respondents' business and that others in the same area made louder sound without being cited – would lead a person in respondents' position reasonably to conclude he was within the bounds of the law.[5]

Finally, petitioner (Pet. 27-29) misguidedly faults the Virginia Supreme Court for relying on *Thelen* v. *State*, 526 S.E.2d 60 (Ga. 2000), and *People* v. *New York Trap Rock Corp.*, 442 N.E.2d 1222 (N.Y. 1982). Pet. 27-29, emphasizing that these decisions involved laws lacking "reasonable person" limitations. But it is not at all clear that Virginia Beach's noise ordinance includes a "reasonable person" limitation; § 23-47 prohibits noise that *either* is "unreasonabl[y] * * * loud *or* * * * disturbs a reasonable person." *Id.* (emphasis supplied). And it is readily apparent that disturbance of an *actual* (reasonable) person is not required. As the courts below found, Virginia Beach enforced the ordinance repeatedly against

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[5] Although petitioner notes that respondents were given "warnings," (Pet. 7), *Morales* held that warnings are insufficient absent constitutionally sufficient standards. See 527 U.S. at 58-59. Nor, in this case, does the presence of enumerated (but non-exhaustive) prohibitions buttress the ordinance. None of these provides any check on selective enforcement, and, as written, a number raise additional First Amendment difficulties. See, *e.g.*, City Code § 23-47(5) (prohibiting "use of any * * * instrument or device for the purpose of attracting attention, by creation of noise, to any * * * sale or display of merchandise").

respondents without ever receiving a complaint. To the extent those decisions held, as petitioner says, that disturbance by itself is constitutionally *insufficient*, neither *Trap Rock* nor *Thelen* comes close to suggesting that actual disturbance is *unimportant*. Rather, both cases arose from multiple serious complaints. See *Thelen*, 526 S.E.2d at 61 (operating a helicopter); *Trap Rock*, 442 N.E.2d at 1223 (operating a stone quarry at night). As the Virginia Supreme Court recognized, the ordinance here at most substitutes a different form of "subjective determination"-based enforcement for the sort held impermissible in those cases.

III. The Decision Below Is Particularly Unsuited For Further Review

The issue actually decided below – that one jurisdiction's ordinance failed to satisfy the constitutional vagueness test established by this Court's precedents – is of no broad importance. Moreover, that decision was rendered by the court with the final say on the construction of the local law, see *Morales*, in a case brought under the Virginia Constitution, over which it also has the last word, cf. *Brigham City* v. *Stuart*, 547 U.S. 398, 409 (2006) (Stevens, J., concurring).

Even within the single jurisdiction of Virginia Beach, the decision has less practical significance than petitioner might claim. If petitioner were able

to persuade this Court that the Virginia Supreme Court erred, the city would find itself facing significant additional constitutional hurdles before it could enforce the ordinance. The city would have to show that it satisfies other First Amendment requirements and is constitutional as applied, despite undisturbed and unchallenged findings that enforcement was "selective"; that "similarly situated" businesses were treated differently; and that those generating more complaints were left alone entirely. Pet. App. 21a-22a.

And as noted above (but not in the petition), the city has enacted a new law that "establishes" a detailed and comprehensive "noise control program," City Code § 23-65. It is far from clear that the city would, in fact, attempt to enforce the old ordinance if it were now allowed to; but the city's adoption of this highly specific, decibel-based system, would also bear on whether it *could* do so, by casting a shadow on any claim by petitioner that the problem-riddled approach reflected in its older provision is in fact "necessary to achieve the government's interest," *Ward*, 491 U.S. at 798–800.

For these and other reasons, this case would be an entirely inappropriate vehicle for revisiting constitutional standards for noise ordinances, even were the Court persuaded that there is any real need to do so. As has been shown above, whether there is such a thing as a "typical" municipal noise control

ordinance, this one, which authorizes prosecution based entirely on a police officer's belief that a reasonable person "would be" disturbed – and which has given rise to two enforcement standards, is surely *a*typical. The detailed state court findings of selective and arbitrary enforcement, the fact that the suit was litigated below on state law grounds; and that the decision petitioner seeks to have reviewed only reached one of several alternative grounds that would support invalidation all take this case still further out of the mainstream, cf. *Bd. of Trustees* v. *Fox*, 492 U.S. 469, 483-85 (1989) (noting "the usual judicial practice" of deciding as-applied challenges first). And as just noted, resolving petitioner's claims would likely entail answering the sort of questions, relating to petitioner's freshly-enacted standard, that are especially unsuited for resolution in the first instance by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 2009

APPENDIX

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Va. Const. Art. I, § 11, Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

Va. Const. Art. I, § 12, Freedom of speech and of the press; right peaceably to assemble, and to petition.

That the freedoms of speech and of the press are among the great bulwarks of liberty, and can never be restrained except by despotic governments; that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; that the General Assembly shall not pass any law abridging the freedom of speech or of the press, nor the right of the people peaceably to assemble, and to petition the government for the redress of grievances.

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No. 09-314

In The
Supreme Court of the United States

CITY OF VIRGINIA BEACH, VIRGINIA,

Petitioner,

v.

BRADLEY TANNER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Virginia

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Reply Brief in Support of Petition For Writ Of Certiorari

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The City of Virginia Beach files this reply to identify several analytical flaws in Respondents' Brief in Opposition. These flaws not only expose the constitutional error in the decision below, but also underscore the importance of this Court's review.

I. This is Not a First Amendment Case.

Though Respondents continually direct this Court to jurisprudence involving vagueness and overbreadth challenges to statutes which inhibit free speech, the case before this Court does not implicate the First Amendment.

Respondents press this Court to adopt a more strict application of the standard for unconstitutional vagueness which courts apply in contexts involving First Amendment concerns.[1] See Connally v. General Construction Co., 269 U.S. 385, 391 (1926). However, the City's ordinance does not infringe upon constitutionally protected speech, and this Court should decline Respondent's invitation to rely upon the more stringent First Amendment standard.

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[1] Among others, Respondents cite Saia v. New York, 334 U.S. 558, 561-61 (1948) (finding an ordinance forbidding the use of sound amplification without the permission of the Chief of Police as **violative of the right to free speech**)(emphasis added)) and Reeves v. McConn, 631 F.2d 377, 386 (5th Cir. 1980) (employing the more stringent vagueness standard to asses a noise ordinance which included limitations on amplified sound and **implicated First Amendment concerns**)(emphasis added)).

Rather, this Court should adhere to the traditional standard for determining if the City's noise ordinance survives a vagueness challenge, specifically "whether the terms of [the] statute are so indefinite that men of common intelligence must necessarily guess at its meaning and differ as to its application." Id. (internal citations omitted). The City's ordinance survives Respondents' vagueness challenge under this well-settled standard.

II. Respondents' Recited Cases are Not Analogous and Do Not Provide This Court with Guidance Regarding the Vagueness Challenge.

While seemingly on point, Respondents artfully disguise the reality that the case law upon which they rely is readily distinguishable and/or inapplicable to the case at bar.

Respondents cite Chicago v. City of Morales for the proposition that there are two independent reasons for invalidating a statute for vagueness, specifically lack of fair notice and susceptibility of arbitrary enforcement. 527 U.S. 41, 56 (1999). Brief in Opp. 11. Respondents assert that because the City's ordinance is not evenly enforced, the ordinance is unconstitutional. Brief in Opp. 13-14.

Respondents fail to point out that the second test for vagueness requires both arbitrary *and* discriminatory enforcement. See Chicago, 527 U.S. at 56. While Respondents quickly assert facts regarding arbitrary enforcement, there simply are no facts to support any assertion of discriminatory

enforcement. In ruling on the Respondents' as-applied challenge, the trial court found as fact that the City did not discriminatorily enforce the noise ordinance. This factual finding defeats Respondents' "arbitrary enforcement" argument.

Respondents also take issue with the City's "across the street guideline" which officers *may* use to determine whether noise is unreasonably loud. Brief in Opp. 11, 13. Citing Deegan v. City of Ithaca, 444 F.3d 135 (2006), Respondents contend that the facts are strikingly similar to the case at bar, and assert that pursuant to the analysis set forth therein, the City's ordinance is likewise unconstitutional.

Again, Respondents misinterpret Deegan. Unlike the present case, Deegan involved an as-applied challenge. The court found that given the facts, the prohibition of noise that can be heard 25 feet away restricted more noise than was necessary —particularly protected speech—and thus the ordinance implicated First Amendment concerns. In addition, the court found that officers used the 25-foot guideline as the sole method of determining the reasonableness of noise, including speech, and did not take into consideration the other factors set forth in the statute. In contrast to Deegan, officers for the City take into consideration several factors, including the "across the street guideline," in determining whether the potential violation meets the reasonable person threshold. Accordingly, Deegan is distinguishable.

III. Respondents Misconstrue the Authority Cited by the City.

Contrary to Respondents' assertion, the Supreme Court of Virginia's reliance on Thelen v. State, 526 S.E.2d 60 (Ga. 2000) and People v. Trap Rock, 442 N.E.2d 1222 (N.Y. 1982) was not appropriate. Respondents incorrectly identify the existence of underlying complaints as a crucial factor in Thelen and Trap. However, neither court relied upon the existence of a third-party complaint as a factor in its vagueness analysis.

Instead, Trap Rock noted the difficulty in narrowing the context of a noise enforcement ordinance and acknowledged that ordinances which place a limitation on enforcement usually survive a vagueness challenge. 442 N.E.2d at 1226. The court also noted that on the other hand, those ordinances in "which vague words could not take on a reasonable degree of definitiveness have not survived." Id. The words "unreasonably loud, disturbing and unnecessary" have been upheld in certain contexts as withstanding a constitutional vagueness challenge. See Grayned v. City of Rockford, 408 U.S. 104 (1972)(holding that terms "disturbs" or "tends to disturb" were not unconstitutionally vague in the challenged noise ordinance); Kovacs v. Cooper, 336 U.S. 77, 79 (1949)(holding that the terms loud and raucous were not unconstitutionally vague). Thus, with the added protection of the *objective* reasonable person standard, the City's noise ordinance is sufficiently limited to survive a constitutional challenge.

The Thelen court reiterates the fundamental rule of law that a statute is unconstitutionally vague if it depends upon the individualized sensitivity of each complaint. 526 S.E.2d at 62. The court notes that the insertion of a reasonable person standard removes the subjectivity from enforcement, and in many instances, saves the ordinance from infirmity. Id. at 63. Thus, Thelen repudiates the Respondents' contention that enforcement of the City's noise ordinance should be triggered only by a complaint. By relying on a subjective complaint, the Respondents' approach is the antithesis of the objective standard necessary to implement enforcement.

IV. Because this Is a Facial Challenge to the Ordinance, the Facts Are Immaterial.

Interestingly, Respondents focus on facts which ultimately provide little or no value to answering the question before the Court, specifically, is the City's noise ordinance facially void for vagueness.

Respondents repeatedly refer to facts in the record—particularly the lack of a third party complaint and the existence of the across the street guideline—to support their assertion that the Supreme Court of Virginia correctly held that the City's statute was void on its face. However, Respondents (and the Supreme Court of Virginia) ignore the fact that the trial court sustained the City's demurrer with respect to the facial challenge, deciding the issue on the pleadings. Simply put, the

trial court did not consider any of Respondents' facts when it determined that the City's ordinance survived the facial challenge. Thus, the testimony upon which Respondents rely only relates to the as-applied challenge, an issue the Supreme Court of Virginia did not even address.

V. Respondents Misinterpret the Reasonable Person Standard.

Respondents erroneously tout the Supreme Court of Virginia's misguided interpretation of the long-standing reasonable person standard and take great pains to point out the contextual differences between the City's noise ordinance and other situations in which the law imposes a reasonable person standard. However, this argument fails to consider that regardless of the context, the standard itself remains unchanged.

Courts have gone to unusual pains to emphasize that the reasonable person is

> [an] abstract and hypothetical character []. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful man, who is always up to standard. Nor is it proper to identify him even with any member of the very jury who are to apply the standard; he is rather

> a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.

Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1544 n.3 (6th 1992) (internal citations omitted).

Thus, applied in the context of the City's noise ordinance, the court does not ask whether there is "*any* person who could find" the noise loud and disturbing, "whether *some* people" may be disturbed by the noise, or "whether *some* reasonable person *might* think" the noise is unreasonably loud and disturbing." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779-80 (1995) (citing Americans United, 980 F.2d at 1544, which discusses the hypothetical reasonable person in the context of the Establishment Clause). Instead, the court must ask whether *the reasonable person* would find the noise unnecessary, loud and disturbing. Id.

Interestingly however, in the context of the City's noise ordinance, Respondents and the Supreme Court of Virginia apply the reasonable man standard as a subjective one. Respondents contend that because the ordinance does not call for an actual third party complaint, the reasonable person standard is not sufficient to save it from constitutional infirmity.

There are two problems with Respondents' logic. First, and quite simply, a third party complaint does not exist in this case because the constitutionality of the statute was before the trial

court on Respondents' motion for declaratory judgment and injunctive relief. A complaint was not a predicate to such an action.

Second, and more importantly, Respondents take the reasonable person standard and turn it on its head. In essence, Respondents are suggesting to this Court that a *subjective* third party complaint must be the trigger for an *objective* review of the alleged violation. This is exactly backwards. That a single person—who may or may not be a reasonable person—is disturbed by the noise is not a sufficient basis upon which to warrant issuance of a citation. However, when an officer determines that the noise when compared with a threshold for enforcement action would disturb a reasonable person, then there is a sufficient objective basis upon which to issue the citation.

It is certainly true that with every potential violation, an officer must make a decision based upon the facts and determine whether the facts taken together would meet the reasonable person threshold. See Grayned v. City of Rockford, 408 U.S. 104, 114 (1972) ("As always, enforcement requires the exercise of some degree of police judgment, "but when confined, "that degree of judgment . . . is

permissible.").[2] However, because the officer must make such an informed decision does not mean the standard—i.e., *the objective reasonable person standard*—changes as a matter of law.

VI. The Supreme Court of Virginia Relied upon Federal Law and its Holding Was Not a Narrow Interpretation Limited to the Virginia Constitution.

Respondents do not outright assert that this Court lacks jurisdiction to entertain Petitioners' writ, but instead contend that the Supreme Court of Virginia rendered an opinion on the construction of a local law under the Virginia Constitution, and thus

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[2] The City agrees with Respondents that Grayned upheld the noise ordinance in question based upon the limited context of the statute in question. 408 U.S. 104, 112 (1972). However, Grayned does not mandate that noise ordinances contain a scienter or "willfulness" requirement nor does Grayned require that a noise ordinance be limited to a specific context such as the school context. Rather, Grayned simply requires that a noise ordinance not be so vague as to "punish[] for the expression of an unpopular point of view," and that the ordinance "contains no broad invitation to *subjective* or *discriminatory* enforcement." Id. at 113 (emphasis added).

Contrary to Respondent's assertion, the reasonable person standard—which was not part of Rockford's anti-picketing statute, thus necessitating other contextual limitations—places a significant limitation on the ability of police officers to enforce the City's ordinance. Moreover, while Respondents make much ado about the uneven enforcement of the ordinance between outdoor and indoor entertainment venues, Respondents fail to acknowledge the trial court's holding—albeit in the context of the as-applied challenge—that there was no discrimination in the manner of enforcement.

the issue should be of little or no importance to this Court.

By failing to address the issue of jurisdiction head on, Respondents have conceded that the Supreme Court of Virginia rendered its opinion based upon federal precedent. See United States Supreme Court Rule 10(c). Moreover in limiting their assertion to state that "the suit was *litigated below on state law grounds*," Respondents implicitly admit that the Supreme Court of Virginia's decision itself rested instead on the U.S. "Due Process Clause" and supporting federal jurisprudence from this Court and federal courts of appeal. Clearly this Court has jurisdiction to entertain this appeal.

VII. The Supreme Court of Virginia's Holding Has Far-Reaching Significance.

Respondents mistakenly assert that the Supreme Court of Virginia's holding is of "no broad importance." The reality remains that as a result of the holding, dozens of jurisdictions within the Commonwealth of Virginia either have changed or will need to change their reasonable person-based noise ordinances. In many instances, those localities replaced their noise ordinances with decibel or distance-based ordinances which, in and of themselves, may have constitutional implications. See, e.g., U.S. Labor Party v. Pomerleau, 557 F.2d 410 (4th Cir. 1977)(holding unconstitutional a noise ordinance which regulated amplified speech, utilized a subjective method to measure decibel levels and resulted in uneven enforcement).

In addition, a Delaware trial court has stayed the matter of Walsh v. Town of Bethany Beach, 4733-VCN (Sept. 25, 2009), in which the plaintiff challenges Bethany Beach's noise ordinance. As in the present case, Bethany Beach's noise ordinance contains a reasonable person standard. More importantly, however, than the ramifications to municipalities within the Commonwealth and across the nation, the Supreme Court of Virginia's holding has called into question the meaning of the reasonable person standard which permeates this Court's jurisprudence.

Respondents also assert that because the City has enacted a new ordinance, the Supreme Court of Virginia's opinion should not be reviewed by this Court. However, the City prefers the reasonable person-based ordinance, and because the ordinance before this Court has not been repealed, Respondents' contention that the holding has little significance is without merit.

CONCLUSION

The City respectfully requests this Court review the Supreme Court of Virginia's holding in Tanner v. City of Virginia Beach and hold that the court erred in finding the City of Virginia Beach's noise ordinance void for vagueness.

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